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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 253

THE UNITED STATES, PETITIONER

vs.

PENN FOUNDRY AND MANUFACTURING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 31, 1948
CERTIORARI GRANTED NOVEMBER 8, 1948

Supreme Court of the United States

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In the Court of Claims of the United States

No. 46122

PENN FOUNDRY AND MANUFACTURING CO., INC., Waynesboro, Virginia,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

PETITION FILED JUNE 21, 1944

To the Honorable, the Chief Justice and Associate Justices of the United States Court of Claims:

The Claimant, PENN FOUNDRY AND MANUFACTURING COMPANY, INC., a corporation organized in the year 1911 in the State of Virginia, with main offices at Waynesboro, Virginia, states:

1. That it has been a manufacturing corporation engaged in various types of manufacturing ever since its incorporation in 1911, except for periods of time when, because of business conditions, its activities were suspended or reduced. During all of said time its main office and place of business and its manufacturing plant and machinery have been located at Waynesboro.

2. That on January 3, 1941, and prior thereto, Claimant was engaged in the operation of its said plant and machinery at Waynesboro, Virginia, and at said time and on said date of January 3, 1941 and prior thereto, had purchased and placed in its said plant all necessary machinery, equipment and facilities which enabled it to engage in the manufacture of many articles needed in the National Defense Program of the United States and particularly fitted it for the manufacture of such articles as gun mounts and related facilities and articles needed by the Defendant, the United States of America, in its Defense Program; and that on said date of January 3, 1941, and prior thereto, Claimant had determined on a policy and program of seeking and obtaining from the Defendant, the United States of America, certain contracts, when obtainable, for the manufacture of those things which its facilities enabled it to manufacture economically and with reasonable speed, and which were required by the Defendant in its Defense Program.

3. On said date of January 3, 1941, it initiated negotiations with the Defendant through one of its agencies known as the Navy Planning Board and also with the Bureau of Ordnance, for the purpose of securing from the Defendant a contract for the manufacture, at its said plant in Waynesboro, Virginia, of a number of gun mounts to be agreed upon between the Claimant and Defendant: That in order to carry forward said negotiations, and to be ready for the performance of any contract so negotiated, Claimant had procured and had on hand on said date of January 3, 1941 and continuously thereafter all necessary basic machinery, machine tools and equipment for the completion of any contract which might be obtained as a result of said negotiations, of which the said Defendant, the United States of America had full knowledge and information, not only from detailed information furnished by Claimant, but by reason of their own investigation through fully authorized agents who inspected the same. That said inspections of Plaintiff's plant and equipment were made as early as March 12, 1941 and from time to time thereafter during the periods of time herein referred to.

4. Claimant further says that following the conferences held between it and the Defendant between January 3, 1941 and April 19, 1941, the Defendants became satisfied after due inspections as to the sufficiency of the equipment, machinery and facilities of the Claimant to perform the required work and services for the manufacturing of five hundred (500) gun mounts for the Defendant and upon suggestion of the Defendant to its duly authorized agents and after the investigations aforesaid, by the Defendant, the Plaintiff filed on April 19, 1941 a proposal in detail for the manufacture and delivery of said five hundred (500) gun mounts with the United States Navy Department, proposing to manufacture said gun mounts under plans and specifications furnished by the Defendant under all required guarantees for the protection of said Defendant and including the assumption of all financial risk and responsibility by Claimant through its own fiscal agencies and without loans or other forms of financial assistance from Defendant either for operation or plant expansion.

5. Claimant further shows that following its conferences with the Navy Planning Board, which occurred on January 3, 1941, as heretofore alleged, it began actively to make its plans with a view to submitting a proposal for work to be done at its plant for the Defendant; that from time to time, upon inspections made of its plant by agents of the Defendant from the Inspection Bureau, Naval Ordnance and from the Gun Mount Section of the United States Navy, Washington, D. C., said Claimant was told that it should put its equipment, plant and facilities in perfect condition to handle said contract as speedily as possible, that accordingly, Claimant proceeded with procurement of the necessary personnel, including engineers and technical men, and also material for said

purposes. That subsequent to filing its proposal on April 19, 1941, further detailed inspections were made.

6. That following the filing of this proposal dated April 19, 1941, the Claimant was advised by the Gun Mount Section of the Navy Department that its proposal would be favorably acted upon and that Claimant should proceed further and speedily to get itself in readiness for the prompt performance of its said proposal. That on to-wit April 26, 1941, by its duly authorized agents, Defendant advised Claimant that after due inspection, its agents had found Claimant's production methods were satisfactory; following which Claimant continued its activities to make ready for the performance of any contract awarded it under the terms of this proposal of April 19, 1941, incurring further additional expenses for engineering and the purchase of necessary material for the performance of said proposal. And Claimant considered that at all times herein referred to it had entered into a bona fide understanding with the Defendant that it should incur said expenses for personnel, engineering and materials in order to enable it to perform the terms of its said proposal.

7. That on to-wit September 25, 1941, after unreasonable delays by the Defendant's not acting upon Claimant's proposal, the Defendant requested of the Claimant through its duly authorized representatives, the filing of a written memorandum of additional data or information as to Claimant's facilities and capacity to perform its said proposal.

8. That on to-wit September 25, 1941, such memorandum was delivered to Plaintiff, copy of which is hereto attached as Exhibit No. 1 to this Petition.

9. That complying with the terms of said memorandum of September 25, 1941, Claimant, to-wit on October 7, 1941 furnished the information requested including a complete detailed study of all machine tool operations and hours involved in producing the principal parts of said five hundred (500) gun mounts, supposed to be manufactured by Claimant in its proposal of April 19, 1941.

10. That during all of the time while said discussions referred to in preceding paragraphs were in progress, the Claimant continued to pay out large sums of money for personnel, executive expenses and for engineering services and for putting in perfect condition its plant and facilities for speedy performance of the terms of its said proposal, relying upon the repeated assurances of the Defendant that Claimant would receive the contract proposed to be performed in its proposal of April 19, 1941.

11. That on November 29, 1941, Defendant presented to Claimant plans for a modified unit of the gun mounts proposed to be manufactured by Claimant with the request that Claimant revise its price in writing for said modified units; that Claimant did so on

December 13, 1941, reducing the number of the gun mounts the United States, through its duly authorized agent, proposed to be manufactured, from five hundred (500) to three hundred (300) as had been requested by agents for said Defendant, and thereafter on December 18, 1941, as rquired by law and regulations of the Navy Department, a conference was held in the Bureau of Ordnance of the United States Navy Department and in strict accordance therewith, the order was confirmed and the Bureau of Supplies and Accounts of the United States Navy Department was ordered to issue a contact as approved. Said conference was attended by the following representatives of the Defendant:

Capt. A. R. Marron
Lt. Comdr. A. E. Uehlinger
Lt. H. St. John Butler
Lt. Comdr. Parker
Ensign Smith

and that Claimant was represented at said conference by H. C. Parse, Vice President, and H. M. Johnson, Assistant to the President, of the Plaintiff corporation, said Johnson having had previous continuous charge of all actual negotiations between the Claimant and Defendant. And that as a result of said conference, and the submission of said second or modified proposal, that said officials of the Defendant duly authorized so to do, assured Claimant that it should have and would duly receive confirmation of an order to manufacture one hundred and fifty (150) of the proposed said three hundred (300) gun mounts and that the Defendant further assured Claimant that a letter of intent with regard to said work would not be necessary as the contract proper would be issued promptly without the formality of such letter of intent.

12. That following said conference, to-wit on December 24, 1941, the Defendant by its Bureau of Ordnance, United States Navy Department, in confirming the provisions and agreements of the aforesaid conference, executed and caused to be delivered to the Claimant an executed copy of an official memorandum providing that the Claimant would be given full authority in the near future to proceed with the manufacture of one hundred and fifty (150) of the three hundred (300) gun mounts covered by its proposal previously filed with the United States Navy Department, duly authorized agent of the Defendant. (Copy attached hereto and marked Exhibit No. 2.)

13. That following the receipt of the said official notification, Claimant continued to incur large expenses for engineering, material and labor in making ready for the manufacturing program of the anticipated order.

14. Claimant further shows that although they had been assured by Defendant that a letter of intent was unnecessary in Claimant's case to create a binding agreement with the Defendant, neverthe-

less on January 7, 1942, a letter of intent was received dated December 29, 1941, which letter of intent by its terms required an acceptance on or prior to January 15, 1942 by Claimant and that on January 10, 1942 said letter of intent was so accepted by Claimant. (Copy of letter of intent and acceptance thereof is hereto attached and marked as Exhibit No. 3 to this Petition), and that said letter of intent provided that Claimant should manufacure the following:

Item	*Articles required*	*Number*
1	3"/50 Caliber A. A. Mounts, Mark 22, Mod 2	150
2	Sets, Spare Parts for Vessels	75
3	Sets, Spare Parts for Tenders	10
4	Sets, Spare Parts for Shore Bases	10
5	Necessary Tools	—
6	Necessary Pattern Equipment	—

15. Claimant further shows that immediately following the receipt of the "letter of intent" (dated December 29, 1941 and received by Claimant January 7, 1942 Exhibit No. 3 hereto attached), it proceeded, with all possible speed, to perfect all necessary plans and arrangements to perform the work specified in said "letter of intent", and in so doing continued the work of procuring and obligating itself to pay for necessary engineering services, operating personnel, material required, additional equipment and machinery, thereby incurring large expenses and obligating itself for additional costs and charges against future specifications made necessary by said "letter of intent" and its acceptance by Claimant.

16. That Claimant, with the full knowledge of Defendants, through their responsible representatives, treated said "letter of intent", Exhibit No. 3 hereof, as a definite authorization to proceed to do everything necessary and to incur all reasonably necessary expense to get its plant and machinery in a state of readiness to begin actual production of the articles therein described and did so proceed and was so proceeding on to-wit February 23, 1942 when there was issued and delivered to Claimant a definite order and contract (Navy Contract No. LL96553) authorizing and directing Claimant to proceed with the manufacture of one hundred and fifty (150) gun mounts and the other items described in said "letter of intent" of December 29, 1941 (Exhibit No. 3 hereto), the Defendant by said order (Navy Contract No. LL96553) agreeing to pay Claimant therefor the sum of $2,087,555.00. Copy of said order and Contract is attached hereto as Exhibit No. 4 to this Petition.

17. That immediately following receipt of said order of February 23, 1942 and in conformity therewith, as well as with previous instructions and in line with the terms of said letter of intent of December 29, 1941 (Exhibit No. 3 hereto) and in order to expedite further the plans theretofore agreed upon between agents and

officers of Claimant and Defendant, Claimant's agents redoubled their energies and efforts to start production, in their plant at Waynesboro, Virginia, of the articles covered by their said order of February 23, 1942 (Exhibit No. 4 hereto), and concluded and finally executed agreements and arrangements for all additional engineering personnel, purchases of material and equipment, and the hiring of operating personnel, at great present and future expense, as will be hereinafter set out in detail and did and performed all requirements and activities assumed by it or contemplated by said "letter of intent" Exhibit No. 3 hereto, or said order-contract, Exhibit No. 4 hereto, of February 23, 1942 and thereby became entitled as matter of law and by the agreements herein recited to receive and recover all the amounts for charges, expenses, profits, damages and disbursements contemplated between the parties and made necessary by reason of the negotiations and agreements herein referred to.

18. That immediately subsequent to the delivery to the Claimant of the contract-order dated February 23, 1942, Exhibit No. 4 hereto, Claimant further perfected its plans for carrying out the terms and conditions of said contract, upon which it had been working under previous agreements with the Defendants and in order to do so continued to employ its engineering force and other personnel and made further plans for the delivery of the necessary material for said performance and was actively so engaged when the Defendant, without notice or warning, and without valid or legal reason or excuse, on March 9, 1942, caused to be delivered to the Claimant a certain notice from the Defendants, purportedly coming from the Bureau of Ordnance, United States Navy Department, through the office of the Inspector of Naval Material at Philadelphia, Pennsylvania, cancelling and terminating said contract, and Claimant says, upon receipt of said notice, it was also notified that its efforts to carry said contract out should be discontinued and terminated and that no further service or work should be done and Claimant says that because of said illegal, wrongful, unwarranted and unlawful action, that there was created a gross breach of contractual rights of Claimant and that it was damaged thereby and suffered losses as hereinafter fully set forth in detail:

(a) That subsequent to the above unwarranted and illegal cancellation of the contractual rights of Claimant as set forth in the preceding paragraph that the Defendants, through Lts. Malcolm Sharpe and F. B. Hatcher of the Norfolk Naval District—thereunto wrongfully directed by the Defendant—entered upon the premises of Claimant on to-wit April 22, 1942, while Plaintiff was in legal and peaceable possession of its premises, plant, equipment and machinery and forcibly and without notice to Claimant or authority to do so, proceeded to take possession of Claimant's plant and property, including all machinery and equipment therein and took from the said plant and dismantled and removed from said plant, machinery

and equipment of great value—to-wit of the value of $74,045.20, the machinery being the following:

2 Automatic Screw Machines 1⅛ and 1¼"
1 Long & Alstatter Double End Punch #3
2 Automatic Screw Machines, 1"
1 10 x 6' Niles Boring Mill
1 Turret Lathe W&S #2, Serial No. 86093
1 Turret Lathe, Wood, Hole 1"
1 Turret Lathe W&S Hole 1¾"
1 Turret Lathe W&S 1"
1 Engine Lathe 14" x 3' Hendey
1 Portable Floor Crane
1 Milling Machine, Beeker
1 F.E. Reed Turret Lathe
1 16" x 9' Lathe
1 22" x 12' Lathe
1 #3 Punch & Shear
1 10 H. P. Electric Motor
1 15 H. P. Electric Motor
1 26 H. P. Electric Motor
1 50 H. P. Electric Motor

All complete with starting equipment

The Defendant then and there took possession of the remaining machinery and equipment and supplies of Claimant and gave notice to Claimant's agent of their purpose to dismantle and remove additional machines at some subsequent date, according to the pleasure of said Defendant, through its agents and therefore, by said wrongful and unlawful acts of trespass and breach of contract damaged Claimant in the said sum of $74,045.20; and Plaintiff says that subsequent to the taking of aforesaid machinery that Defendant has paid to Plaintiff on account thereof the su mof $25,256.57 on account of said seizure.

(b) That on to-wit July 23, 1942, said Defendants through said Lt. F. B. Hatcher, United States Navy—thereunto authorized by the Defendants—entered upon possession of Claimant's plant at Waynesboro, Virginia and again proceeded to dismantle, and remove therefrom, without notice or legal authority so to do, the following machinery:

2 chain hoists
1 Perkins punch press
1 26" planer
1 shaper
1 Post drill
1 Vice for Planer

said machinery being of the fair and reasonable value of $4,850.00 and that by the wrongful and unlawful taking of said machinery that Defendant became in debted to Plaintiff in the said sum of $4,850.00; and Plaintiff says that subsequent to the taking of aforesaid machinery that Defendant has paid to

Plaintiff on account thereof the sum of $1,194.94, on account of said seizure.

(c) That on November 17, 1942, the Defendant, through Lt. Malcolm Sharpe, U. S. N. and Lt. Thomas R. Sutner, U. S. N.—thereunto authorized by the Defendant—again entered upon the premises of the Plaintiff and dismantled and removed therefrom the following valuable machinery:

1 45" x 15' New Haven Lathe

1 Double Head Bolt Threading Machine

said machinery having the reasonable value of $10,825.00; and that by the wrongful and unlawful taking of said machinery that Defendant became indebted to Plaintiff in the said sum of $10,825.00; and Plaintiff says that subsequent to the taking of aforesaid machinery that Defendant has paid to Plaintiff on account thereof the sum of $4,000.00 on account of said seizure.

19. Claimant further charges and alleges that by reason of the unlawful and wrongful cancellation of their contract of February 23, 1942, that reasonable profits on said contract amounting to $501,013.00 were lost by Plaintiff, and that the Defendant is indebted to Plaintiff for said sum by reason of said unlawful and unwarranted attempt by Defendant to cancel and abrogate said agreement; that by reason of said cancellation of said contract, in addition to the loss by requisitioning of Claimant's machinery, as set forth in the preceding paragraphs and sub-paragraphs (a), (b) and (c), that Plaintiff was damaged by reason of the taking, dismantling and deprivation of control and possession of its plant and machinery at Waynesboro, Virginia through the agents of Defendant, to the total value thereof, which over and above the machinery removed from said premises by Defendant's agents, Plaintiff says was $270,279.80.

20. Plaintiff further shows that the Defendants are further indebted to Claimant because of their wrongful and unlawful action as hereinafter set out and in accordance with the "letter of intent" delivered to Claimant by the Defendant, dated December 29, 1941, copy of which is hereto attached as Exhibit No. 3, for the following additional sums which Claimant says were reasonably incurred and within the contemplation of the parties to said "letter of intent" (Exhibit No. 3 hereto) and said contract of February 23, 1942 (Exhibit No. 4 hereto) as follows:

(a) For legal obligations, commitments and charges incurred and expended by Claimant for sales and engineering expenses growing out of attempted performance by Claimant of the agreements and contract hereinafter set out, $104,377.00.

(b) On account of payments made and obligations entered into with engineers and other personnel to comply with requirements of the Defendant in the carrying out of the terms of said

contract of February 23, 1942, LL96533, and the terms of said "letter of intent" dated December 29, 1941, in the sum of $34,000.00.

(c) That Defendants likewise, because of their wrongful and unlawful cancellation and breach of their obligations under said contract of February 23, 1942 and said "letter of intent" of December 29, 1941, became indebted to the Claimant for payments made and obligations and commitments entered into for additional machinery to equip their plant at Waynesboro, Virginia, in order to carry out the terms of said proposal and contract in the sum of $8,800.00; that growing out of said attempted cancellation by Defendants of Claimant's contract of February 22, 1942, Defendants also became indebted to Claimant for sub-contracts and commitments reasonably entered into by Claimant in the sum of $10,000.00; that by reason of said herein described unlawful actions and purported cancellation of Claimant's contract and "letter of intent" hereinabove set out, that Defendants further became indebted to Claimant for the amount expended in reconditioning Claimant's plant to comply with safety and other regulations, terms of Claimant's contract with Defendants, in the sum of $23,269.00.

21. Claimant further shows that on April 22, 1942, by order of officers of the United States Navy Department, who were then on the premises of the Claimant's plant in Waynesboro, Virginia, the complete plant, all machinery therein, equipment, material and supplies of every kind were "frozen", which said action was subsequently approved by the United States Navy Department, and/or the War Production Board, Washington, D. C., and claimant was ordered and required to discontinue the using of said plant, the sale thereof or the disposition of anything therein until said plant was released. That said "freeze order" has remained in effect from said date of April 22, 1942 to the present date thereby tying up said plant and preventing its use in any manner by said Claimant and destroying its value to Claimant, making it impossible for Claimant either to use, sell or dispose of said property or to secure any income therefrom; thereby completely destroying the value of said plant, with great damage to claimant as herein set out.

22. That because of each and all of the aforesaid items, the Defendant is indebted to Claimant in the total sum of $1,011,007.49 for which Claimant asks judgment of the Court.

WHEREFORE, Claimant prays judgment against the United States of America for the sum of $1,011,007.49 and interest thereon from November 17, 1942 until paid and for such other and further relief as to the Court may seem equitable and proper.

ROBERT H. MCNEILL,
815 15th Street, N. W.
Washington, D. C.,
Attorney for Claimant.

Exhibit No. 1 to Petition.

N. Ord. 6

IN REPLY ADDRESS
BUREAU OF ORDNANCE, NAVY DEPARTMENT
AND REFER TO NO.

NAVY DEPARTMENT
(Prōc) BUREAU OF ORDNANCE
WASHINGTON, D. C.

25 September 1941

MEMORANDUM to Mr. Johnson from Lt. Comdr. Uehlinger.

Subject: Additional information in connection with the manufacture of 3"/50 mounts.

1. The following additional information is required in order to continue discussions concerning the manufacture of 3"/50 mounts by Penn Foundry and Machinery Company.

(a) A statement of the financial setup of the company in sufficient detail to permit evaluation and investigation.

(b) Positive evidence of firm commitments between Penn Foundry and Machinery Company and the proposed subcontractors.

(c) A study of the machine tool hours and operations together with names and locations of machine tools in sufficient detail to enable a check to be made of the sufficiency of the tools involved.

(d) Proposed dates of first delivery and monthly rate of delivery.

2. The above should be predicated upon the possible award of one hundred fifty (150) 3"/50 mounts of the simplified design, *i.e.* without sights, with an option for the Government to retain the right to order one hundred (100) percent additional if the company were to meet requirements as to delivery and quality.

3. The above information will be used as a basis for further discussions and is not to be considered a commitment on the part of the Government.

A. E. UEHLINGER
Lt. Comdr., U. S. N.

U/FWS

Exhibit No. 2 to Petition.

N. Ord. 7.

IN REPLY ADDRESS
BUREAU OF ORDNANCE, NAVY DEPARTMENT
AND REFER TO NO.

NAVY DEPARTMENT
(Pr5c) BUREAU OF ORDNANCE
WASHINGTON, D. C.

S74-2 (3") Dec. 24, 1941

From: The Chief of the Bureau of Ordnance.

To: The Commandant and Superintendent, U. S. Naval Gun Factory, Washington, D. C.

Subject: Penn Foundry and Manufacturing Company, 3"/50 Caliber A.A. Mounts Mark 22 Mod. 2, Vandyke prints for manufacture of.

Reference: (a) BuOrd restr. ltr. S74-2(3") (Pr5c) of November 28, 1941, copy to NGF.

1. As indicated in reference (a), the Bureau is conducting negotiations with the Penn Foundry and Manufacturing Company, Waynesboro, Virginia, for the manufacture of one hundred fifty (150) 3"/50 caliber A.A. mounts Mark 22 Mod. 2. It is anticipated that a letter of intent will be forwarded to that company at an early date covering the manufacture of this equipment. It is requested that the Naval Gun Factory forward to the Penn Foundry and Manufacturing Company, Waynesboro, Virginia, a complete set of Vandyke prints for the manufacture of 3"/50 caliber A.A. mounts Mark 22 Mod. 2 at the earliest practicable date.

W. H. P. BLANDY
A. E. UEHLINGER
By direction

B/L WS

Copy to:
INN, Philadelphia
Penn Foundry & Mfg. Co.,
Waynesboro, Virginia.

RESTRICTED

Exhibit No. 3 to Petition.

NAVY DEPARTMENT
BUREAU OF SUPPLIES AND ACCOUNTS
Washington, D. C.
29 December 1941

LL-NOs:96553(SPC)
L4-1(10)
L4-3(46)

Sirs:

This is to confirm the advice given you that it was anticipated that the Navy Department would place with your company an order for the manufacture of one hundred fifty (150) 3"/50 caliber A. A. Mounts, Mark 22, Mod. 2, complete, together with spare parts, necessary special tools, jigs, gauges and fixtures and pattern equipment, as follows:

Item	*Articles Required*	*Number*
1.	3"/50 Caliber A. A. Mounts, Mark 22, Mod 2	150
2.	Sets, Spare Parts for Vessels	75
3.	Sets, Spare Parts for Tenders	10
4.	Sets, Spare Parts for Shore Bases	10
5.	Necessary Tools	—
6.	Necessary Pattern Equipment	—

Two (2) complete mounts are to be delivered in May, 1942, three (3) in June, 1942, and five (5) in July, 1942, and thereafter at a minimum rate of ten (10) mounts per month.

The cost of the above will be defrayed from funds appropriated and now available for use by the Navy or under authorization for the consummation of contracts.

The Secretary of the Navy finds that in the interest of National Defense it is necessary that production be not delayed awaiting the placing of the aforesaid order. You are hereby authorized to purchase materials necessary for the production of the mounts and spare parts and to proceed with the production thereof in anticipation of the placing of the order, subject to the receipt by the Purchasing Officer of notification of the items to be purchased with estimated maximum prices and confirmation by the Purchasing Officer of authorization to proceed with such purchases.

In the event that the order for the mounts and spare parts is not placed with your company prior to 1 April 1942, the Government will, upon demand made prior to 1 May 1942, reimburse you for the cost incurred by you and will assume your obligation for any commitments which you have made in this connection. Upon payment and assumption by the Government, title to such material, including rights under commitments assumed, will vest in the Government.

You will agree in connection with the purchase of materials as aforesaid that you will comply with all laws pertaining or relating to the purchase of such materials. All applicable contract clauses required by Federal Law to be incorporated in contracts for articles of the kind herein contracted for are hereby incorporated herein by reference. Your attention is invited to the National Defense clause included in later contracts.

Army-Navy Munitions Board preference rating A-1-a(1 & 5) will be assigned the equipment to be covered by this contract.

If the foregoing is acceptable to you, will you kindly so indicate on the enclosed three (3) copies of this letter and return to the Purchasing Officer on or prior to 15 January 1942, thereby constituting this letter a contract until the execution of a formal contract at which time this letter of Intent will become null and void.

Yours very truly,

RAY SPEAR
Rear Admiral SC U S N
Contracting Officer
Paymaster General of the Navy

Approved:
Forrestal
Under Secretary of the Navy

Accepted: January 10, 1942
Penn Foundry & Mfg. Co., Inc.
(Signed)
By A. F. Holliday
President
(Title)

Penn Foundry & Mfg. Co., Inc.
Waynesboro, Virginia.

Exhibit No. 4 to Petition.

N. S. A. 503
(Revised Aug. 1941)

THIS IS YOUR OFFICIAL AWARD OF
NAVY CONTRACT NOs. LL 96553

NAVY DEPARTMENT
BUREAU OF SUPPLIES AND ACCOUNTS
Washington, D. C.

RESTRICTED
NSA REQ'N 2509 23 February 1942

Sirs:

Your proposal, contained in schedule Special-Ord opened in this Bureau on Special, is hereby accepted with respect to the following material:

Lot Number	*To be Delivered*	*Remarks*
	Fob Waynesboro Va	Gun mounts Priority rating A-1-a, certificate AN-4331576 assigned to this contract

This acceptance is your authority to commence performance in accordance with the terms of your proposal without waiting for the formal contract, which will be in the amount of $2,087,555.00. If, however, the schedule requires approval of *your* plans (blueprints), you must secure such approval prior to starting production.

Pending receipt of the contract please be governed by the instructions contained in the schedule as regards specifications and inspection. Inspection will be made by Inspector of Naval Material Philadelphia Pa at the place of manufacture, unless otherwise provided in the schedule.

THE UNITED STATES OF AMERICA
M. A. NORCROSS
By G F YORAN
Purchasing Officer, Bureau of Supplies and Accounts, Navy Department.

PENN FOUNDRY & MFG CO
Waynesboro Va

GENERAL TRAVERSE—FILED JULY 31, 1944.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(S) FRANCIS M. SHEA,
Assistant Attorney General.

N.A.C.
E.E.E.

DEFENDANT'S COUNTERCLAIM—FILED FEBRUARY 28, 1947.

On February 28, 1947, on motion made therefore and allowed by the court, the defendant filed a counterclaim, which is as follows:

Comes now the defendant by its Assistant Attorney General, and by leave of court first had and obtained, and without waiving any

of the defenses interposed or interposable under the general traverse heretofore pleaded, files this counterclaim and alleges:

1. On or about June 26, 1943, A. H. Holliday, president of plaintiff corporation, executed a release on behalf of said plaintiff, whereby in consideration of the payment by the United States to plaintiff of the sum of $4,000.00, A. H. Holliday, purporting to act on behalf of plaintiff corporation, released the United States from all actions, claims, etc., which plaintiff might have by reason of, or in any way arising directly from the requisitioning of certain machinery by the defendant, acting through its Navy Department. This release is in evidence in this case as Defendant's Exhibit 18.

2. Defendant paid the sum of $4,000.00 to plaintiff, as consideration for said release, in reliance on representations by A. H. Holliday and other officers and representatives of plaintiff that A. H. Holliday was authorized by plaintiff corporation to execute said releases on its behalf.

3. The money so paid by defendant as consideration for said release was paid to plaintiff and received by it. The execution of the release, the payment of the money, and the receipt thereof by plaintiff, were all with the full knowledge and consent of plaintiff, its officers, and legal counsel.

4. On or about September 16, 1943, W. L. Dally, trustee under a deed of trust from plaintiff corporation, executed two releases which are in evidence in this case as Defendant's Exhibits 16 and 17, whereby in consideration of the sum of $12,628.28 and $597.47, respectively, paid to him by defendant, acting through its War Production Board and Defense Supplies Corporation, W. L. Dally, trustee, released defendant from all actions, claims, etc., by reason of, or in any way arising directly out of the requisitioning by defendant, acting through the aforementioned agencies, of certain machinery belonging to plaintiff corporation, subject to a mortgage in favor of W. L. Dally, trustee.

5. The sums of $12,628.28 and $597.47, respectively, were paid by defendant to W. L. Dally, trustee, as consideration for the two releases, in reliance on representations by W. L. Dally and other officers and representatives of plaintiff corporation that W. L. Dally was an active responsible executive officer of plaintiff corporation, authorized in his own name as trustee to act on behalf of and to bind the said corporation in the execution of the aforementioned releases.

6. The monies so paid by defendant to W. L. Dally, trustee, as consideration for said releases were by him paid over to plaintiff corporation or to its account. The execution of the releases, the payment of the monies, and the receipt thereof by plaintiff were all with the full knowledge and consent of plaintiff, its officers, and legal counsel.

7. On February 4, 1947, plaintiff, in hearings before a Commissioner of this Court, denied the validity of said releases insofar as their binding effect on plaintiff is concerned; on the grounds that said A. H. Holliday and said W. L. Dally had no power or authority to execute said releases on its behalf.

8. Plaintiff still retains all the three sums of money so paid, totalling $17,225.75, notwithstanding its denial of the validity of the three several releases in consideration of which the monies were paid. If said releases are invalid, defendant is entitled to the return by plaintiff of said sums of money.

Wherefore, defendant asks judgment against plaintiff—

a. For the sum of $17,225.75, with interest to date of judgment;
b. For its costs, as provided by law.

Respectfully submitted.

JOHN F. SONNETT,
Assistant Attorney General.

HENRY WEIHOFEN,
Attorney, Department of Justice.

ARGUMENT AND SUBMISSION OF CASE—JAN. 6, 1948.

On January 6, 1948, the case was argued and submitted on merits by Mr. David G. Bress for plaintiff, and by Mr. Henry Weihofen for defendant.

SPECIAL FINDINGS OF FACT, CONCLUSION OF LAW AND OPINION OF THE COURT BY MADDEN, J. FILED FEBRUARY 2, 1948.

Mr. David G. Bress for the plaintiff. *Mr. Robert H. McNeill, Mr. T. Bruce Fuller,* and *Newmyer & Bress* were on the briefs.

Mr. Henry Weihofen, with whom was *Mr. Acting Assistant Attorney General Herbert A. Bergson,* for the defendant.

This case having been heard by the Court of Claims, the court, upon the report of a commissioner and the evidence, makes the following:

SPECIAL FINDINGS OF FACT

1. Plaintiff is a corporation organized under the laws of the State of Virginia for the purpose of engaging in the manufacturing business, with a plant at Waynesboro, Virginia.

2. In January 1941, plaintiff's plant was idle and had been for some years. Plaintiff had previously, for a time, been engaged in the manufacture of circular saws and had done work in connection with brake shoes and some other minor work. The plant had been purchased by plaintiff in 1911. When acquired, it was equipped with certain machinery and equipment, and shortly after acquisition certain additional used machinery was acquired and placed in

the plant. The plant was actively engaged until around 1931, since which time it has been used for minor engagements only, requiring not more than four or five employees. The plant consisted of six buildings, of which three main buildings, each 57 x 100 feet, were referred to as the machine shop, the foundry, and the blacksmith shop. Among the smaller buildings was a two-story office building. The buildings were of brick and stone with metal roofs. The main buildings were built about 1890. The officers of the company in 1940 were engaged in other businesses at or near Pittsburgh, Pennsylvania, and one stockholder and director of the company was engaged in the real estate business in Waynesboro. He had been the local manager of the plant when it was in operation, and continued to be its local manager and the statutory agent for the company thereafter.

3. Late in 1940 or early in 1941 the officers of the company became desirous of engaging in the National Defense program. In January 1941 the company engaged one H. M. Johnson as assistant to the president, and, later, Gordon Kennedy, an engineer, as general manager. Mr. Johnson, in January 1941, held a conference with officials of the Navy Department with respect to plaintiff's availability to manufacture gun mounts. Mr. Johnson was active in this behalf throughout the year 1941. In April 1941 the company submitted a proposal to the Navy Department for the manufacture of 500 three-inch 50-caliber gun mounts. Prior to July 1941, plaintiff had submitted to the Navy Department a list of equipment which was owned by the plaintiff or deemed available by plaintiff's representative for the work. In July 1941 a representative of the Gun Mount Section of the Navy Department inspected plaintiff's plant and also talked to the engineer who was later to be engaged as plaintiff's general manager. A conference was held by the Bureau of Ordnance in September, following which plaintiff was asked to furnish information as to financial ability, commitments of subcontractors, and a detailed study of the machine tool operations, predicated upon a possible award of 150 three-inch 50-caliber mounts. On October 7, 1941, the company submitted additional information, and on December 13, 1941, modified slightly its previous proposals.

On December 22, 1941, a meeting was held by a representative of the Bureau of Ordnance, Navy Department, and the plaintiff, for the purpose of negotiating a contract. At this conference plaintiff's proposal as to prices, quantities, delivery schedule, payments and options for additional mounts was accepted as satisfactory, and plaintiff's representative agreed to furnish a letter from a surety company indicating that a bond of the nature required by the Bureau of Supplies and Accounts would be furnished.

4. Thereafter the plaintiff was given a letter dated December 29, 1941, confirming the advice that it was anticipated that the Navy

Department would place an order with plaintiff for the manufacture of 150 of the gun mounts, with deliveries as follows:

> Two (2) complete mounts are to be delivered in May 1942, three (3) in June 1942, and five (5) in July 1942, and thereafter at a minimum rate of ten (10) mounts per month.

This letter contained the following paragraphs:

> The Secretary of the Navy finds that in the interest of National Defense it is necessary that production be not delayed awaiting the placing of the aforesaid order. You are hereby authorized to purchase materials necessary for the production of the mounts and spare parts and to proceed with the production thereof in anticipation of the placing of the order, subject to the receipt by the Purchasing Officer of notification of the items to be purchased with estimated maximum prices and confirmation by the Purchasing Officer of authorization to proceed with such purchases.
>
> In the event that the order for the mounts and spare parts is not placed with your company prior to 1 April 1942, the Government will, upon demand made prior to 1 May 1942, reimburse you for the cost incurred by you and will assume your obligation for any commitments which you have made in this connection. Upon payment and assumption by the Government, title to such material, including rights under commitments assumed, will vest in the Government.

The letter was signed by the Paymaster General of the Navy as contracting officer and approved by the Undersecretary of the Navy. This "letter of intent" was accepted by the plaintiff on January 10, 1942, and returned to the Navy Department. Under date of January 7, 1942, plaintiff was sent a letter as follows:

> In connection with the Letter of Intent which has been issued to you covering one hundred fifty (150) 3"/50 caliber A. A. Mounts, Mark 22, Mod. 2, it is the understanding of this Bureau that no expenditures under this Letter of Intent will be approved until such time as you furnish a letter from an approved surety company containing a firm commitment to act as surety on a performance bond in the event that a contract is executed. This was the understanding reached between representatives of your company, the Bureau of Ordnance and the Bureau of Supplies and Accounts at the time this contract was negotiated in the Navy Department at Washington.
>
> Such a letter should be obtained and forwarded to this office promptly so that work may proceed under the authority of the Letter of Intent.

By a letter of January 29, 1942, the company was advised by the Navy Department that the letter from a surety company with reference to the giving of a bond had not been received and that failure promptly to submit such a letter might result in the termination of the letter of intent. On February 3, 1942, plaintiff's

representative submitted to the Navy Department a letter from a surety company with reference to the bond. The letter indicated that the surety company thought that a bond in connection with a contract of this size would have to be reinsured and that unless some change were made in the financial set-up, reinsurance would be declined, but if either of two suggested plans relative to refinancing was accomplished by plaintiff, and the plaintiff furnished certain information as to new key personnel to be engaged by the plaintiff, reinsurance could be obtained and the surety company could execute a bond. The representative of the plaintiff who presented this letter to the Department testified that the official who received it said that it was satisfactory. A witness for the Government testified that he overheard the conversation, and that it was to the effect that the letter would be considered, to determine whether it was satisfactory.

5. On January 16 and 17, 1942, plaintiff's plant was visited by inspectors of the Philadelphia Inspection District of the Navy Department to instruct plaintiff's personnel as to the Navy inspection requirements. At the time there was no one at the plant except the watchman and the local manager. No work at all was being performed at the time. On February 19, 1942, a production specialist from the War Production Board visited the plant. His duties were to assist production in factories in the production of naval ordnance. At that time only the watchman was at the plant. The production specialist inspected the plant with the local manager, who was called from his real estate office, and also talked with Mr. Johnson, who was called to Waynesboro for that purpose. Reports of these visits were given to the Navy Department. At that time the company was not prepared to undertake work of the character proposed by the contract, and would not for an indefinite time be prepared successfully to complete a contract for 150 gun mounts. Plaintiff's foundry was incapable of production of the cast steel forgings required for the gun mounts. It was plaintiff's plan, as shown by its proposal to the Government, to subcontract for the castings, as well as for other parts of the work. Plaintiff had contacted certain producers, who were willing to furnish castings and other parts, but no contracts for the castings or any other parts had been made by plaintiff. There was no reason to suppose that the plaintiff could not have obtained these parts from subcontractors. Plaintiff planned to use around 150 mechanics, skilled, semi-skilled, and unskilled, in the machining and assembling of the gun mounts. Plaintiff had expected to secure former railroad shop mechanics residing near Waynesboro as the bulk of its employees. The construction of gun mounts is difficult and exacting work. Manufacturers experienced in somewhat similar work with large organizations and trained mechanics required from seven months to one year from the time of receiving notice to proceed until the first gun mounts were produced. Plaintiff had no manufacturing

organization and no force of trained personnel to train unskilled employees. Plaintiff's proposed general manager was at this time a regular employee of another company in Ohio. He had been assisting plaintiff in its plans under the expectation that he would sever his connection with the other company and become plaintiff's general manager. A contract between plaintiff and the engineer under the terms of which the engineer was engaged as general manager was executed on February 24, 1942.

6. Under date of February 23, 1942, the Navy Department mailed to plaintiff a notice of award of contract, No. LL96553, for gun mounts, in the amount of $2,087,555, which notice of award was received by the plaintiff on February 24, 1942. On February 24, 1942, after it had received the notice of award, plaintiff received a telegram as follows:

> NOTICE OF AWARD CONTRACT NOS 96553 FORWARDED IN ERROR RETURN FOR CANCELLATION NO AWARD TO YOU ACKNOWLEDGE REFERRING SYMBOL SPF—
>
> RAY SPEAR PAYMASTER GENERAL NAVY

On March 5, 1942, the Navy Department prepared and mailed to plaintiff a letter as follows:

> SUBJECT: Preliminary award of Contract LL-NOs-96553 for 3"/50 Caliber A. A. Mounts, Mark 22, Mod. 2.
>
> Reference: (a) Bureau of Supplies and Accounts Letter of intent LL-NOs-96553 (SPC) of 29 December 1941.
> (b) Bureau of Supplies and Accounts letter LL-NOs-96553 (SPC), L4-1 (10), L4-3 (46) of 7 January 1942.
> (c) Bureau of Supplies and Accounts Letter LL-NOs-96553 (SPC) of 29 January 1942.
>
> Sirs: By reference (a) you were advised that no expenditures under Letter of Intent LL-NOs-96553 (SPC), dated 29 December 1941, would be approved until such time as you furnished a letter from an approved surety company containing a firm commitment to act as surety on a performance bond in the event that a contract should be executed. Reference (b) advised you that failure to submit promptly such a letter might result in termination of the Letter of Intent.
>
> As it is apparent that you cannot secure a bond to insure faithful performance of the contract, no contract will be issued to you, and the Letter of Intent LL-NOs-96553 (SPC, dated 29 December 1941, is hereby cancelled.
>
> Since no authority has been given you to incur any expenses under the Letter of Intent, there can be no liability on the Government by reason of the cancellation of the Letter of Intent.
>
> Please return the original and all copies of the Letter of Intent, unsigned, to the Bureau of Supplies and Accounts for cancellation.

7. Plaintiff, in 1940 and early 1941, made expenditures in connection with its endeavor to secure Navy work, such as fencing in its plant, repairing broken windows, and making certain other minor repairs to the plant proper, most of which, except the fence, were in the nature of routine maintenance. It also made expenditures and incurred obligations in connection with obtaining the services of a vice president, an assistant to the president, and an engineer, as general manager, in anticipation of getting National Defense work. The evidence does not disclose that any expenditures or expenses were incurred in reliance on the letter of intent or notice of award of contract.

8. If the plaintiff had been permitted to perform its contract, it would have made a net profit of not less than $80,000.

9. On March 23, 1942, the War Production Board advised plaintiff, by telegram not to dispose of certain designated machine tools until further directions from the Bureau of Priorities. On April 22, 1942, the Defense Supplies Corporation, on behalf of the Government, requisitioned certain machine tools from plaintiff's plant and later fixed the fair and just compensation for such tools at $25,256.57, and 50 percent thereof, $12,628.29, was paid by the Government. On September 16, 1943, after an agreement had been reached that $25,256.57 constituted fair and just compensation, the balance of $12,628.28 was paid by the Government. On July 23, 1942, the Defense Supplies Corporation, on behalf of the Government, requisitioned certain machine tools from plaintiff's plant and later fixed the fair and just compensation for said tools at $1,194.94, and 50 percent thereof, $597.47, was paid by the Government. On September 16, 1943, after an agreement was reached that $1,194.94 constituted fair and just compensation, the balance of $597.47 was paid by the Government. On September 16, 1943, simultaneously with the two payments referred to above, two releases were signed by W. L. Dally as trustee for the plaintiff. The payments by the Government were made to W. L. Dally, who used the money on behalf of plaintiff. At the time of these two requisitions, W. L. Dally was trustee under a deed of trust executed by plaintiff to secure the payment of a bond. The deed of trust was executed on April 20, 1942, and it recited as one condition that if the corporation sold any of the property, the entire proceeds would be paid to the trustee, and in the event any of the property covered by the deed of trust was taken by eminent domain, the trustee would collect and receipt for all money payable for the property so taken. Plaintiff, by its counsel, on February 17, 1943, requested that the 50-percent payments for the property requisitioned in April 1942 be paid to W. L. Dally, trustee. Plaintiff, by its assistant to the president, on March 8, 1943, made a similar request with respect to the 50 percent of the award for the property requisitioned in July 1942. Both 50-percent payments were made to W. L. Dally, trustee. The

two releases signed by W. L. Dally, trustee, released and discharged the Government "of and from all * * * claims and demands whatsoever, in law or in equity * * * in any way arising directly from the requisitioning of" the property, without in any way affecting "the signatory's rights as to other claims against the Government * * *".

On November 15, 1942, the Navy Department requisitioned certain machine tools from plaintiff's plant and later fixed $4,000 as the fair and just compensation for the property requisitioned. The $4,000 was paid to plaintiff on June 26, 1943, on which date the plaintiff accepted said amount in full and complete settlement of its claim for compensation and released the United States from any and all claims arising from or in connection with the requisitioning of the property. This release was signed by plaintiff's president pursuant to authority of a resolution of the board of directors and after the bond secured by the deed of trust of April 20, 1942, was paid and released.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover $80,000.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of eighty thousand dollars ($80,000).

OPINION

MADDEN, *Judge*, delivered the opinion of the Court.

The plaintiff is a Virginia Corporation whose principal stockholders reside in or near Pittsburgh, Pennsylvania. It has, since its incorporation in 1911, owned a manufacturing plant at Waynesboro, Virginia, consisting of six brick and stone buildings, with metal roofs, located on about six acres of ground. In 1940 the plant contained numerous large and small machine tools and accessories, which had been used very little since their acquisition by the plaintiff, but had not deteriorated to any considerable extent. The plant had been idle for some years before 1940.

Late in 1940 or early in 1941 it occurred to the officers of the plaintiff that their plant and equipment might be put to profitable use in manufacturing products for national defense. H. M. Johnson, Assistant to the President of the plaintiff company, began discussions with purchasing officials of the Navy Department with a view to obtaining a contract. In April 1941, the company submitted to the Navy a proposal for the manufacture of 500 three-inch 50-caliber anti-aircraft gun mounts. It furnished a list of equipment which it had or could obtain for the work. In July a Navy Inspector inspected the plant and talked to Mr. Gordon Kennedy, the engineer

who was later to become the plaintiff's general manager. A conference was held in September, in the Navy Department, and thereafter the plaintiff was asked to furnish further information, including a detailed study of the machine-tool operations which it would use if it were awarded a contract for 150 of the gun mounts. It furnished the study, and modified slightly its previous proposals. On December 22, 1941, a meeting of representatives of the plaintiff and of the Bureaus of Ordnance and of Supplies and Accounts was held in the Navy Department, at which meeting the plaintiff's proposal was discussed and was said to be satisfactory. The plaintiff's representative was asked if it would be satisfactory for the plaintiff to endeavor to obtain a letter from a bonding company saying that it would be willing to furnish a bond to secure the performance of the contract, and replied affirmatively.

On December 29, 1941, the "letter of intent" to give the plaintiff a contract in due course, parts of which letter are quoted in Finding 4, was written. This letter was accepted by the plaintiff and returned to the Department on January 10, 1942. By a letter dated January 7, the plaintiff was advised that no expenditures under the letter of intent would be approved until the plaintiff had furnished a letter from an approved surety company containing a firm commitment to act as surety on a performance bond in the event that a contract should be executed. The letter asked that the plaintiff furnish the bonding company commitment promptly "so that work may proceed under the authority of the letter of intent." On January 29, the plaintiff was advised by letter that it had not furnished the bonding company commitment, and that failure to do so promptly might result in the termination of the letter of intent. On February 3, the plaintiff's representative submitted to the Department a letter from a surety company saying that it would be willing to write a bond if the plaintiff's financial structure were changed in either one of two ways which were stated in the letter. The Navy Department official to whom the letter was submitted told the plaintiff's representative either that the letter was satisfactory, as testified by the plaintiff's representative, or that the letter would be taken under consideration to determine whether it was adequate, as testified by another Department official who was sitting in the same room and testified that he heard the conversation.

On February 23, 1942, the Department mailed to the plaintiff a writing, the first lines of which said in capital letters "THIS IS YOUR OFFICIAL AWARD OF NAVY CONTRACT NO. LL 96553." The tenor of the paper, which is plaintiff's exhibit 9, is that it was a final award of a contract pursuant to the plaintiff's proposal. This writing was received by the plaintiff at Waynesboro in the forenoon of February 24. Later on that day the plaintiff received a telegram from the Department, which we have quoted in

Finding 6, saying that the award had been forwarded in error and should be returned for cancellation.

The events recited above raise the question whether or not the Government made a contract with the plaintiff. The Government urges that the apparent closing of the contract was a nullity, because it was done by mistake. The asserted mistake was made somewhat as follows. When the letter of intent was issued on December 29, 1941, that, under Department procedure, set in motion a series of steps which would, in due course, result in the mailing of a notice of award, unless the procedure was interrupted, which it was not in this case. In the meantime, the officials who had discretion as to whether or not it would be prudent to award a contract to the plaintiff were still in doubt, and continued to ponder the question, along with the many other questions involved in their day-to-day work. They did not reach their conclusion, which was that the contract should not be awarded, until the day after the letter awarding the contract had been mailed. They then tried to make their conclusion effective by sending the telegram of February 24.

We think that the Government made a contract with the plaintiff, and that no mistake of the kind which would vitiate a contract occurred. When the responsible officials directed their subordinates to prepare and mail to the plaintiff an acceptance of its proposal, as they did when they set the departmental procedure in motion to that end, they made no mistake. They did it after their conference of December 22 at which the plaintiff's proposal had been fully considered, and at which time they were aware of what the plaintiff had in the way of plant, equipment, management, and prospects for a labor force. There may have been many reasons why the proposal should not have been accepted, but they had had a full opportunity to investigate those reasons, and they still wished to accept it. The slow but apparently normal progress from the letter of intent on December 29 to the notice of award on February 23 gave them plenty of time to change their minds, and head off the award. They did change their minds, and by February 24 they were no longer willing to contract with the plaintiff. But the Government had already contracted with the plaintiff. Immediately thereafter, it regretted its contract, not because of any mistake as to any fact, but because, upon a more mature consideration of all the facts, the officials of the Department thought it would have been wiser not to have made the contract. There must, however, come a time when deliberations as to whether or not to make a contract ends, and the rights and obligations of the contract itself, if one is made, begin.

The Government's contention that the plaintiff's failure to furnish a letter from a bonding company expressing a willingness to write a performance bond, if requested, was a justification for cancelling the contract, is not valid. When the plaintiff's representative on

February 3 submitted the bonding company letter to the same Navy official who later signed the notice of award, there was no legal requirement of a bond, when a contract was not let on bids, and it was natural for the plaintiff to suppose, from the fact that the official received the letter and made no further request of the plaintiff for a bond or a firmer commitment, that nothing further was expected of it. There was no legal reason why the contract could not be awarded, without any further steps in regard to a bond, and, as we have seen, it was awarded. Indeed, the Government's witnesses testified that the question of the bond was not the real reason for the cancellation of the contract, although it was represented in the Government's letter of March 5, quoted in Finding 6, as the only reason.

We have concluded above that the plaintiff had a contract with the Government. There is no question about the Government's breach of the contract, by refusing to permit the plaintiff to perform it. The plaintiff is, therefore, entitled to recover its damages, if any resulted from the breach. The Government urges that there were none; that the plaintiff could not have performed the contract at all, and certainly not with such efficiency as to have made a profit.

In any case of a breach of a contract the performance of which would require a long succession of activities over a considerable period of time, it is far from certain that the contractor would have made a profit if he had been permitted to perform. It could be pointed out that many contractors have, by reason of accidents, changed conditions, inflation, or other eventualities, lost money on contracts from which they hoped to profit. Yet that does not prevent courts from awarding damages for breach of such contracts, nor compel courts to suppose that loss is as probable as gain in the performance of contracts. We should, therefore, if this were the case of a company undertaking to supply its normal product, award it its normal profit as damages. Here, however, the plaintiff was venturing into an untried field, as, indeed, the Government in its emergency desired companies which had idle plant and machines to do. Its production manager, Kennedy, who was highly thought of by the Government for his experience and ability, was willing to come with the plaintiff at a rather modest salary but with an arrangement whereby he was to have a percentage of the profits. This is substantial evidence that one expert who had studied the situation carefully anticipated that the performance would produce profits. The stockholders of the plaintiff, who were willing to finance performance without asking for any advance funds from the Navy, must have anticipated that the contract would produce a profit. We think that the consideration and tolerance with which the Government, during the time here in question, treated contractors actually engaged in producing defense material, if the contractor in good faith did his best to perform, is an indication that the

plaintiff, if allowed to perform, would probably have succeeded in making a profit.

On the other hand, it must be said that the plaintiff would have had problems and difficulties that an active, going concern would not have had, and those difficulties would probably have adversely affected its profits. On the whole we can do only what a jury would do in a similar case. We conclude that the plaintiff would probably have made net profits of about 4% of the gross contract price, and we award it $80,000.

The expenses incurred by the plaintiff in repairing its buildings, fencing its property, negotiating with the Navy Department with a view to obtaining a contract, or for other purposes are not recoverable. Until the letter of intent was issued on December 29, 1941, there was no possible reason why the Government should have been responsible for any of the plaintiff's expenditures. On January 7, 1942, the plaintiff was advised that the Government would not be responsible for any expense incurred pursuant to the letter of intent without first securing permission from the Government to make the expenditure. So short an interval elapsed between the award of the contract and its cancellation that no expense was incurred during that time.

We find no merit in that part of the plaintiff's claim relating to the taking of its machines by the Government. An offer was made for them; the plaintiff rejected the offer and accepted one-half the offered amount, preserving its rights, as the statute permitted it to do, to sue for the balance of what it claimed to be the value of the machines. 55 Stat. 742, as amended; 50 U. S. C: (Supp. V) War Appendix, Section 721. Many months later, the plaintiff itself offered to accept the balance of the amount originally offered, and to give a release upon payment. This was done. The money was paid to and retained or used by the plaintiff. The circumstances in no way suggest duress, and the plaintiff is bound by its release.

The plaintiff is entitled to recover $80,000. It is so ordered.

Howell, *Judge;* Whitaker, *Judge;* Littleton, *Judge;* and Jones, *Chief Justice,* concur.

JUDGMENT OF THE COURT, FEB. 2, 1948.

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover $80,000.

IT IS THEREFORE ADJUDGED AND ORDERED that the plaintiff recover of and from the United States the sum of eighty thousand dollars ($80,000).

PROCEEDINGS AFTER ENTRY OF JUDGMENT.

On May 3, 1948, the defendant filed a motion for a new trial.

On June 1, 1948, the court entered the following order on said motion:

ORDER.

IT IS ORDERED this first day of June, 1948, that said motion be, and the same is, overruled.

Clerk's Certificate to foregoing transcript omitted in printing.

☆ U. S. Government Printing Office, 1948 J 505204/115

Supreme Court of the United States

Order allowing certiorari

Filed November 8, 1948

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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NO. 253

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

THE UNITED STATES, *Petitioner*

v.

PENN FOUNDRY AND MANUFACTURING COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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Malman, *Policies and Procedures for the Termination of War Contracts*, 10 Law and Contemporary Problems, 449, 452-459, 487-492	18
Office of Contract Settlement, *A History of War Contract Terminations and Settlements* (July 1947), p. 27	23
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Rowley, *The First War Powers Act Cases* (appearing in Shepherd, *Cases and Materials on the Law of Contracts* (2d ed., 1946), pp. 1233-1238	21
Uniform Termination Article for Fixed-Price Supply Contracts, 9 Fed. Reg. 478, 13405	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 253

THE UNITED STATES, *Petitioner*

v.

PENN FOUNDRY AND MANUFACTURING COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on February 2, 1948.

OPINION BELOW

The opinion of the Court of Claims (R. 22-26) has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on February 2, 1948 (R. 26). A motion for a

new trial, seasonably filed, was denied on June 1, 1948 (R. 27). The jurisdiction of this Court is invoked under the provisions of Section 3(b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether, in derogation of the legislative and executive policy governing termination of war contracts during World Wars I and II, the Court of Claims may properly award a contractor substantial anticipated but unearned profits, where his contract was cancelled on the same day that the notice of award was received, and before any work had been done, commitments made, or expenditures incurred.

2. Whether the Court of Claims' ultimate "finding" that respondent would have successfully completed the contract at a substantial profit can support its judgment where the findings of the evidentiary or primary facts are directly to the contrary.

STATEMENT

The Court of Claims' findings disclose the following pertinent facts:

In 1911, respondent, a Virginia manufacturing corporation, was incorporated and acquired a plant (at Waynesboro, Virginia), mainly built in 1890, which was equipped with certain machinery and equipment, to which respondent shortly added other used machinery (R. 16-17). From that time

until about 1931 the plant was "actively engaged," but since 1931 it has been used for "minor engagements" only, requiring not more than four or five employees. In January, 1941 it had been idle for some years (R. 16-17). At that time, the respondent's officers were engaged in other businesses at or near Pittsburgh, Pennsylvania; one stockholder and director, who had been the plant's local manager when it was in operation and continued to be the company's local manager and statutory agent, was in the real estate business in Waynesboro (R. 17). (Apparently, respondent had no other factory or business.)

With the acceleration of the national defense program, late in 1940 and early in 1941, respondent's officers desired to procure a defense contract, and in January, 1941, engaged H. M. Johnson, as assistant to the president, and in February, 1942, Gordon Kennedy, an engineer, as general manager (R. 17, 20) (*infra*, p. 7). Throughout the year 1941, Mr. Johnson actively sought a Navy contract for respondent. A conference was held in January, 1941; in April the company submitted a proposal for the manufacture of 500 three-inch 50-caliber gun mounts; sometime before July, it submitted a list of equipment owned by it or deemed available; in July, a representative of the Navy's Gun Mount Section inspected respondent's plant and also talked to Kennedy; in September, at a conference at the Bureau of Ordnance, the company was asked to furnish

information as to its financial ability, commitments of sub-contractors, and a detailed study of the machine tool operations, predicated upon a possible award of 150 3-inch 50-caliber mounts; on October 7, 1941, respondent submitted additional information; and on December 13, 1941 it slightly modified its previous proposals (R. 17). At a meeting with the Navy's Bureau of Ordnance, on December 22, 1941, respondent's proposal as to prices, quantities, delivery schedule, payments and options for additional mounts was accepted as satisfactory, and respondent agreed to furnish a letter from a surety company indicating that a performance bond of the nature required by the Navy Bureau of Supplies and Accounts, the contracting agency, would be furnished (R. 17).

Respondent was then given a letter of intent, dated December 29, 1941, confirming the Navy's intent to place an order for the manufacture of 150 gun mounts, two to be delivered in May, 1942, three in June, 1942, five in July, 1942, and thereafter at least ten to be delivered per month. The letter authorized respondent "to purchase materials necessary for the production of the mounts and spare parts and to proceed with the production thereof in anticipation of the placing of the order * * *." If an order were not placed with respondent by April 1, 1942, the Government was to make reimbursement for all costs incurred and to assume all obligations for any commitments made (R. 17-18). This letter of intent was accepted by respondent on

January 10 1942, and then returned to the Navy Department (R. 18). Before this acceptance, respondent had received a Navy letter, dated January 7, 1942, stating that it was understood, pursuant to the agreement reached at the December meeting, that no expenditures were to be made under the letter of intent "until such time as you furnish a letter from an approved surety company containing a firm commitment to act as surety on a performance bond in the event that a contract is executed" (R. 18).

No letter from a surety company having been received by January 29, 1942, the Navy advised respondent on that day that failure promptly to submit such a letter might result in the termination of the letter of intent. On February 3, 1942, respondent's representative submitted a letter in which the surety indicated that a performance bond in connection with a contract of this size would have to be reinsured and that unless some changes were made in respondent's financial set-up, reinsurance would be declined; but that if respondent accomplished either of two suggested refinancing plans and also furnished certain information as to new key personnel to be engaged by it, reinsurance could be obtained and the surety company could execute the bond. Respondent's representative, who presented this letter to the Navy Department, testified that the official who received it said flatly that it was satisfactory; a government witness testified that he overheard the conversation and that it

was to the effect that the letter would be considered to determine whether it was satisfactory (R. 18-19).

Respondent's plant was twice visited, in January and February, 1942, by government representatives. On January 16th and 17th, naval inspectors found no one at the plant except the watchman and the local manager; no work at all was being performed at that time. On February 19, 1942, a War Production Board naval ordnance production specialist found only the watchman at the plant; the local manager was called from his real estate office and accompanied the production specialist in inspection of the plant, and a conference was also had with Mr. Johnson who was called to Waynesboro for the purpose. Reports of both of these visits were given to the Navy Department (R. 19).

The Court of Claims found that on February 19, 1942, the respondent company was not prepared to undertake work of the character proposed by the contract, and would not for an indefinite time be prepared successfully to complete a contract for 150 gun mounts (R. 19). Respondent's foundry was incapable of producing the cast steel forgings required for the gun mounts. It was respondent's plan, known to the Government, to subcontract for these castings, as well as for other parts of the work. Respondent had contacted certain producers, who were willing to furnish castings and other parts. No actual contracts for the castings or for any other parts had been made; but, the court found, there was no reason to suppose that the com-

pany could not have obtained these parts from subcontractors (R. 19). For the bulk of its labor supply, respondent expected to obtain former railroad shop mechanics residing near Waynesboro; its plans called for around 150 mechanics, skilled, semi-skilled, and unskilled, in the machining and assembling of the gun mounts (R. 19).

The Court of Claims also found that the construction of gun mounts is difficult and exacting work; that manufacturers experienced in somewhat similar work, with large organizations and trained mechanics, required from seven months to one year from the time of receiving notice to proceed from the Government until the first gun mounts were produced;[1] that respondent had no manufacturing organization and no force of trained personnel to train unskilled employees; and that respondent's proposed general manager (Kennedy) was still, in February, 1942, a regular employee of another company in Ohio (R. 19-20). Kennedy had been assisting respondent in its plans under the expectation that he would sever his connection with the other company and become respondent's general manager; a contract between respondent and Kennedy, engaging him as general manager, was executed on February 24, 1942 (R. 20).

Under date of February 23, 1942, the Navy Department mailed to respondent a notice of award of contract, No. L[1]96553, for 150 gun mounts, in the

[1] Respondent's alleged contract would have required the completion of two mounts by May, 1942, three in June, 1942, five in July, 1942, and thereafter at least ten each month. *Supra*, p. 4; *infra*, p. 8.

amount of $2,087,555; the brief notice of award authorized respondent "to commence performance in accordance with the terms of your proposal," and indicated that a formal contract would later be forwarded for execution (R. 14, 20). This notice of award was received by respondent at Waynesboro on February 24, 1942 (R. 20). On the same day, after it had received the notice of award, respondent received a telegram from the Navy stating "notice of award contract nos. 96553 forwarded in error return for cancellation no award to you * * *" (R. 20).

This error in sending out the notice of award came about because it was the practice in the Navy Department, after a letter of intent had been issued, for the relevant papers to be sent to the Award Section of the Bureau of Supplies and Accounts, which would—unless notified to the contrary—in due course mail out a notice of award. In this case, the letter of intent of December 29, 1941, was forwarded to the Award Section in routine fashion and that office, not having been informed otherwise, followed its usual practice and sent out the notice of award on February 23, 1942. The officials who had actual discretion to award the contract did not reach their conclusion to terminate negotiations with respondent until after the routine notice of award had been forwarded without their knowledge, and the telegram of February 24, 1942, was sent in correction (R. 24). On March 5, 1942, the Navy followed up this telegram by mailing respondent a

formal cancellation of the original letter of intent of December 29, 1941 (R. 20). No formal written contract was ever consummated. The present suit for alleged anticipatory breach of contract was instituted by respondent in the court below on June 21, 1944 (R. 1).

The Court of Claims held, first, that the notice of award (dated February 23, 1942) constituted a binding agreement, that the revoking telegram came too late, and that the Government had breached the agreement by cancelling it (R. 24-25). The court then proceeded to assess the damages attributable to this breach. It found that respondent had incurred no expenditures or expenses in reliance on the letter of intent or the notice of award of contract (R. 21, 26), but it concluded that "if the plaintiff had been permitted to perform its contract, it would have made a net profit of not less than $80,000." (R. 21, 26). This sum was reached by the court, avowedly acting as a jury (R. 26), on the basis of "about 4% of the gross contract price." (R. 26). Conceding that the respondent was "venturing into an untried field" and that it "would have had problems and difficulties that an active, going concern would not have had, and those difficulties would probably have adversely affected its profits," the court's opinion cites the following factors as reason for believing that respondent would have made a profit: (a) Kennedy, the production manager, an able man, was willing to work for respondent at "a rather modest salary" ($1,000

per month), but with an arrangement for sharing in the profits (5%); (b) respondent's stockholders, who did not ask for government financing, must have anticipated a profit; and (c) "the consideration and tolerance with which the Government, during the time here in question, treated contractors actually engaged in producing defense material, if the contractor in good faith did his best to perform, is an indication that the plaintiff, if allowed to perform, would probably have succeeded in making a profit." (R. 25-26). Judgment was entered for $80,000[2] (R. 26).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In disregarding its findings of the evidentiary or primary facts in making its ultimate finding that "If the plaintiff [respondent] had been permitted to perform its contract, it would have made a net profit of not less than $80,000" (R. 21).

2. In making an ultimate finding (*i. e.*, that respondent would have made a net profit) which is not sustained by its findings of the evidentiary or primary facts.

3. In failing to make the finding that respondent had not proved that it could have successfully performed the contract and made a profit thereon.

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[2] The court refused to award judgment for respondent on a separate claim, not involved in this petition, for the requisitioning of certain machinery, for which respondent had received payment in return for releases which were claimed below to have been invalid (R. 21-22, 26). Accordingly, the court found it unnecessary to pass upon the Government's counterclaim (R. 14-16), which was concerned solely with the separate claim decided against respondent.

4. In failing to hold that respondent had not proved that it suffered any legal damage from the Government's alleged breach of contract, and was therefore not entitled to recover.

5. In failing to hold that the Government could have properly terminated or cancelled respondent's contract, and that respondent was therefore not entitled to recover any unearned anticipated profits.

6. In awarding respondent a sum on account of unearned anticipated profits.

7. In entering judgment for respondent.

REASONS FOR GRANTING THE WRIT

Respondent has unaccountably received a substantial award for unearned anticipated profits, although the Court of Claims' own detailed findings conclusively show that respondent suffered no damage, and could not even have made proper and timely performance of its contract, let alone emerged from the venture profitably. And this gratuitous award has been allowed in the face of established statutory and administrative policy — in both World Wars — not to pay anticipated but unearned profits to contractors whose contracts were cancelled or terminated before completion. The decision below cannot be justified on the basis of principles of general contract law applicable to suits between private parties. Beyond that, it involves an unwarranted imposition of substantial damages upon the Government for actions of its contract

ing officials which were proper in the circumstances and necessary in order to fulfill their responsibilities for the procurement of essential war supplies. For these compelling reasons, the Government respectfully submits that the decision below involves so clear a departure by the Court of Claims from its proper functions as to warrant invocation of this Court's supervisory powers.

1. The evidentiary findings make plain the hollowness of respondent's claim for profits.[1] The contract called upon respondent to begin delivery of the gun mounts within three months of the award and required the production of ten mounts within five months:—two were to be delivered in May 1942, three in June 1942, five in July 1942, and thereafter at least ten a month until the full quota of 150 were delivered (R. 18). But "the construction of gun mounts is difficult and exacting work" and "manufacturers experienced in somewhat similar work with large organizations and trained mechanics required from seven months to one year from the time of receiving notice to proceed until the first gun mounts were produced" (Fdg. 5, R. 19). Moreover, when the instant contract was awarded, at the end of February 1942, the respondent "was not prepared to undertake work of the character proposed by the contract and

[1] For the purposes of this petition, we shall assume that the notice of award, dated February 23, 1942, consummated a binding contract.

could not for an indefinite time be prepared successfully to complete a contract for 150 gun mounts" (Fdg. 5, R. 19). The company "had no manufacturing organization and no force of trained personnel to train unskilled employees"; it likewise had no actual force of mechanics or workers, and had apparently not begun to recruit a labor force, which it "expected" to secure from among former railroad shop mechanics in the vicinity (Fdg. 5, R. 19-20); its officers were then engaged and interested in other businesses in another city, and its only local representative was occupied in the real estate business (Fdg. 2, R. 17); Mr. Johnson, the one executive employee, was apparently not a production expert, and Mr. Kennedy, the proposed general manager (who was an engineer), was working elsewhere and was not actually hired until after the contract award (Fdgs. 3, 5; R. 17, 20). Moreover, the plant had been entirely idle for some years (Fdg. 2, R. 16-17), and had not been actively engaged in a major project since 1931 (Fdg. 2, R. 17); certain plant expenditures had been made, in 1940 and early 1941, in connection with respondent's endeavor to secure Navy work, but most of these were "in the nature of routine maintenance," and none involved equipment or material specially pertinent to the instant contract (Fdg. 7, R. 21). Respondent's previous work had been in fields far removed from gun mounts (Fdg. 2, R. 16-17), and since respondent's foundry was incapable of producing the cast steel forgings re-

quired for the gun mounts, subcontracts would have to be made for these castings as well as for other parts of the work (Fdg. 5, R. 19). Respondent had, however, not yet made any such subcontracts, although it had contacted certain producers, who were willing to furnish castings and other parts (Fdg. 5, R. 19). As late as February 19, 1942, the plant was completely closed, with only a watchman in attendance, and no operations were being carried on; no work had as yet been performed on the contract (Fdg. 5, R. 19). No expenditures or expenses had been incurred by respondent in reliance on the Navy's letter of intent or its notice of award of contract (Fdg. 7, R. 21). Indeed, in the light of the foregoing it may well be doubted that respondent could have met the conditions required by the surety company before it would execute the performance bond which the Navy Department had definitely decided to require in this instance (R. 17-19, 20).

To recover the profits realizable by full performance, respondent bore the burden of showing by "clear and direct proof" both that it would have complied with its contractual obligations and that the result would have been a net gain which can fairly be estimated without speculation. *United States v. Behan*, 110 U. S. 338, 344; *Howard v. Stillwell and Bierce Mfg. Co.*, 139 U. S. 199, 205-210.[*]

[*] To the same effect: *White River Levee Dist. v. McWilliams Dredging Co.*, 40 F. 2d 873, 876-877 (C. C. A. 8); *Dyal v. Wimbish*, 124 F. 2d 464, 467 (C. C. A. 5); *Polar Steamship*

thus from the court's findings of the evidentiary or primary facts, the only conclusion that can be drawn is respondent's entire failure to establish that it would have successfully performed its contract at a profit.[5] Thus, the Court of Claims' contrary finding of ultimate fact, that respondent "would have made a net profit of not less than $80,000" (Fdg. 8, R. 21), stands bereft of all factual support, plainly overridden by the "subordinate or circumstantial findings," and therefore not sustainable "in point of law." (*United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205-206; 303 U. S. 26, 31; *Lowrie* v. *Castle*, 225 Mass. 37, 51; cf. Act of May 22, 1939, c. 140, 53 Stat. 752, formerly 28 U. S. C. 288).

The court's opinion—but not its findings (cf. *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 206; *United States* v. *Seminole Nation*, 299 U. S. 417, 422; *United States* v. *Causby*, 328 U. S. 256, 267)[6]—marshals in support of the judgment the

Corp. v. *Inland Overseas Steamship Corp.*, 135 F. 2d 835, 840-841 (C. C. A. 4), certiorari denied, 320 U. S. 774; *Suburban Contracting Co.* v. *United States*, 76 C. Cls. 533, 544; A. L. I., Restatement of Contracts, sec. 331.

[5] On the basis of evidentiary or primary findings almost identical with those adopted by the court below, the Commissioner of the Court of Claims rationally concluded that "the evidence does not establish that plaintiff could have successfully performed the contract nor made any profit thereon."

[6] A Court of Claims' judgment "may not be upheld as to any item that is not supported by definite findings of fact extending to all essential issues and which, unaided by statements in the court's conclusions of law or its opinion, are clearly sufficient to entitle plaintiff to recover". 299 U. S. at 422.

three factors to which we refer above (*supra*, pp. 9-10),[1] but these clearly provide only the flimsiest of foundations, especially in contrast to the impressive firmness of the detailed findings which the court sloughed off with the assertion that the respondent "would have had problems and difficulties that an active, going concern would not have had, and those difficulties would probably have adversely affected its profits" (R. 26). We note particularly the extraordinary function accorded by the Court of Claims' opinion to the Government's presumed "consideration and tolerance" for war and defense contractors. The findings demonstrate that respondent could not have rendered timely performance of its contract; and make it highly doubtful whether the 150 gun mounts would ever have been produced, even at a loss. The findings also show that the Navy's attitude toward respondent's productive capacities was, at the least, one of great caution. In counterbalance to these facts, the court poses the singular, and unproved, hypothesis that the Government's contracting officials would have shown such indulgence and aid that respondent would have emerged from its venture

[1] The three factors are: (a) Kennedy (the production manager) was willing to work for respondent at "a rather modest salary" ($1,000 per month), with a 5% share in the profits; (b) the stockholders, who did not ask for government financing, "must have anticipated that the contract would produce a profit"; (c) the Government treated defense contractors, at this time, "with consideration and tolerance," if they did their best to perform (R. 25).

not only unmarred by default but possessed of a sizeable profit. Nothing in the record, the evidence, or in common knowledge, supports this supposition of unmeasured generosity. And even if the premise were sustained by the findings or by general knowledge of those times, respondent certainly could not rest a legal title to anticipated profits for breach of contract on the Government's acts of grace in overlooking defaults and providing extra-contractual aid. In the very beginning of the Court of Claims' history, this Court strongly warned against founding contract claims on the Government's "magnanimity and generosity." *Smoots's Case*, 15 Wall. 36, 45.[*]

2. a. The grave error of the lower court in awarding anticipated profits is further underscored by the opposite treatment of such profits in the termination or cancellation of government war contracts for the Government's own convenience. During most of World War II, both the War and Navy Departments required supply contracts as large

[*] "There is in a large class of cases coming before us from the Court of Claims a constant and ever recurring attempt to apply to contracts made by the government, and to give to its action under such contracts, a construction and an effect quite different from those which courts of justice are accustomed to apply to contracts between individuals. There arises in the mind of parties and counsel interested for the individual against the United States a sense of the power and resources of this great government, prompting appeals to its magnanimity and generosity, to abstract ideas of equity, coloring even the closest legal argument. These are addressed in vain to this court. * * *"

as respondent's to contain a termination clause permitting the Government to terminate performance at any time. The wording of these clauses varied, and they were often revised, but from the beginning their provisions uniformly prohibited profits on uncompleted work.[9] The War Department issued formal procurement directives requiring the inclusion of such a termination article in all large supply contracts entered into after September 1941,[10] while the Navy, which employed more informal means of implementing its procurement policy, apparently developed its termination clauses late in 1941 and early in 1942, and required their inclusion in most contracts thereafter executed.[11]

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[9] See Malman, *Policies and Procedures for the Termination of War Contracts*, 10 Law and Contemporary Problems, 449, 452-459, 487-492; Hearings before the Committee on Military Affairs, H. of Reps., 78th Cong., 1st. sess., on H. R. 3022, pp. 27-29, 36-37, 43-44, 562; Uniform Termination Article for Fixed-Price Supply Contracts, 9 Fed. Reg. 478, 13405; Joint Termination Regulations (adopted by the War and Navy Departments, October 1944), secs. 533.538, 541-543, 9 Fed. Reg. 13361-2, secs. 845.533 *et seq.*; Office of Contract Settlement Regulation No. 7, 32 C. F. R., 1944 Supp., 8006.3 (e), p. 3065.

[10] See Malman, *supra*, fn. 9, p. 18, at 452.

[11] The Navy Department informed the Senate, in January 1944, that "Standard termination clauses for fixed price contracts were developed late in 1941, and in general form and substance have been inserted in most contracts entered into since that time except for ship-construction contracts, which constitute a separate problem." Hearings before a Subcommittee of the Committee on Military Affairs, U. S. Senate, 78th Cong., 2d sess., on S. 1268, 1280, and 1470 ("Problems of Contract Termination"), p. 553. To similar effect is a letter of the Acting Secretary of the Navy, dated October 10,

It is probable, therefore, that respondent's formal written contract (which would have been entered into sometime after February 24, 1942) would have authorized the Government to discontinue respondent's performance at any time for any reason, and the Navy could have stopped performance because of dissatisfaction with respondent as a contractor, just as it actually did, without making the United States liable for anticipated but unearned profits. As we show below, the existence of a right in the Government to terminate performance under the contract would wholly destroy respondent's demand for profits, even though the naval authorities did not purport to act under this right. At the least, the more-than-possibility that respondent's formal contract would have expressly permitted such a termination further undercuts respondent's

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1943, reprinted in Hearings, *supra*, at p. 271. See also affidavit of H. Struve Hensel, formerly Assistant Secretary of the Navy (included in transcripts of record in *Pownall* v. *United States*, October Term, 1947, No. 74, and *Alexander Wool Combing Co.* v. *United States*, October Term, 1947, No. 95), describing the termination clauses (including the provisions as to profits), contained in Navy supply contracts in the "first several months of 1942" (R. 174, 177-178, No. 74, October Term, 1947; R. 224, 227, No. 95, October Term, 1947). It is also noteworthy that Mr. Hensel states that during this period (1941-early 1942) Navy "instructions relative to contracts were in the form of individual directives by the Under Secretary to the Bureau Chiefs * * *" and "these directives could be rather informally issued and distributed" (R. 173, No. 74, October Term, 1947; R. 224, No. 95, October Term, 1947). The Court may properly take judicial notice of this affidavit as an official statement, by an authorized representative of the Navy Department, contained in the records of the Court. Cf. *United States* v. *Pink*, 315 U. S. 203, 216.

already weak claim to have shown its loss of profits by the required "clear and direct proof." Of course, respondent could recover any expenses incurred under the contract. But here no such expenses were shown.

b. It may also be that the Government's contracting officials were statutorily authorized, in February 1942, to terminate respondent's performance, regardless of contractual termination clauses, without subjecting the United States to liability for wholly anticipatory profits. In World War I, the Act of June 15, 1917, 40 Stat. 182, empowered the President to "modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material", upon payment of "just compensation." Both this Court and the court below held that under that Act, upon cancellation, the contractor was not entitled to recover anticipated profits. *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, 523-524; *Barrett Co.* v. *United States*, 273 U. S. 227, 235; *Meyer Scale & Hardware Co.* v. *United States*, 57 C. Cls. 26, 50; *Hetrick Mfg. Co.* v. *United States*, 62 C. Cls. 265, 270. The same rule was applied to war contracts made prior to the 1917 act, on the ground that they were necessarily executed subject to Congress' power to enact such legislation. *De Laval Co.* v. *United States*, 284 U. S. 61, 73. In the instant case, Title II of the First War Powers Act (Act of December 18, 1941, c. 593, sec. 201; 55 Stat.

839, 50 U. S. C. App. 611), as implemented by Executive Order No. 9001 (December 27, 1941, 6 Fed. Reg. 6787, 3 C. F. R., 1941 Supp., pp. 330-332), may well have furnished the Navy with an analogous power. That statute authorized the President, or his delegates, "to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made * * * without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate prosecution of the war." In accordance with its wording, legislative history, and purpose, the war agencies and the Attorney General adopted a broad and liberal interpretation of this grant, construing it as extending the dispensing power not only to statutory contracting requirements but also to the common-law principles of contract law, such as those involving consideration.[12] The Act was applied by the Army and the Navy to the termination by agreement of war contracts not containing a termination article (see Opinion of the Judge Advocate General of the Army, SPJGC 164, September 16, 1942, digested in 1 Bull. J. A. G. No. 5, pp. 304-

[12] For the construction of Title II followed by the Attorney General and the War and Navy Departments, and for resumés of its legislative history, see 40 Op. Atty. Gen. No. 53, August 29, 1942; Kramer, *Extraordinary Relief for War Contractors*, (1945) 93 U. of Pa. L. Rev. 357; Rowley, *The First War Powers Act Cases* (appearing in Shepherd, *Cases and Materials on the Law of Contracts* (2d ed., 1946), pp. 1233-1238); Fain and Watt, *War Procurement—A New Pattern in Contracts* (1944), 44 Col. L. Rev. 427, 194 *et seq.*

305); and although the service departments do not appear to have utilized it where the contractor was unwilling to countenance cancellation, we believe that the breadth of the statute's award of authority may well have empowered the Navy unilaterally to amend or modify respondent's contract by terminating all performance, subject to the type of just compensation paid in World War I under the 1917 Act.

If the Government was authorized to cancel the contract, either by a termination article which would have been included in the formal agreement or by Title II of the First War Powers Act, it is immaterial that the Navy did not at first seek to cancel or terminate performance but insisted that no contract had been consummated.[13] It is the substance of the Government's action, rather than the form of words, which should control the issue of liability. In *College Point Boat Corp. v. United States*, 267 U. S. 12, 15-16, this Court refused to allow anticipated profits, as for a breach, where the United States did not purport to cancel the contract under the 1917 Act, but ordered a work stoppage which apparently constituted an anticipatory breach; the existence of the statutory right to cancel, even though not availed of, was held sufficient to bar recovery of prospective gain.

[13] It is to be noted that the Navy's letter of March 5, 1942 (R. 20), expressly constituted a cancellation of the letter of intent (dated December 29, 1941), and was obviously intended to terminate all contractual arrangements.

c. In any case, the deep-rooted and long-established policy against allowing war contractors to reap anticipated unearned profits strongly militates against the Court of Claims' mechanical application of common-law damage rules in favor of a war contractor so little injured as respondent. In the first war, this policy was reflected in the Act of June 15, 1917, *supra*, and in the Dent Act of 1919 (40 Stat. 1272) which expressly barred award of "prospective or possible profits." During the last war, the same policy was administratively followed in all termination matters by the armed services (*supra*, pp. 18-19), and was embodied in the Contract Settlement Act of 1944 (Act of July 1, 1944, c. 358, 58 Stat. 649, 41 U. S. C. 101).[28] "The policy of the government forbade the allowance of profits on that part of a cancelled commitment on which no expenditure had been made and no work had been done." Office of Contract Settlement, *A History of War Contract Terminations and Settlements* (July 1947), p. 27. Heed should surely have been paid to this principle in calculating an award to a war contractor whose agreement was cancelled, in substance, in the same way in which

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[28] Section 6(d)(5) of this Act required war contracting agencies to take into account, in settling terminated contracts, "such allowance for profit on the preparations made and work done for the terminated portion of the war contract as is reasonable under the circumstances." On the basis of the Act, Regulation No. 7 of the Office of Contract Settlement provided: "Profit should be limited to preparations made and work done for the terminated portion of the contract * * *." 32 C. F. R., 1944 Supp., sec. 8006.3(e), p. 3065.

thousands of other war contracts were terminated for the convenience of the Government. By closing its eyes to wartime procurement history and policy, the Court of Claims has granted an unmerited windfall to a contractor whose "damages" were merely nominal. In so holding, the Court of Claims has manifested an approach to Government contract litigation which calls for review and correction by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

August, 1948.

U. S. GOVERNMENT PRINTING OFFICE 1948—803888/P.O. 100

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No. 253

In the Supreme Court of the United States

OCTOBER TERM, 1948

THE UNITED STATES, PETITIONER

v.

PENN FOUNDRY AND MANUFACTURING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 22–26), is reported at 110 C. Cls. 374.

JURISDICTION

The judgment of the Court of Claims was entered on February 2, 1948 (R. 26). A motion for a new trial, seasonably filed, was denied on June 1, 1948 (R. 27). The petition for a writ of certiorari was filed on August 31, 1948 and granted on November 8, 1948 (R. 27). The jurisdiction of this Court rests upon 28 U. S. C. 1255.

QUESTIONS PRESENTED

1. Whether, in derogation of the legislative and executive policy governing termination of war contracts during World Wars I and II, the Court of Claims may properly award a contractor substantial anticipated but unearned profits, where his contract was cancelled on the same day that the notice of award was received, and before any work had been done, commitments made, or expenditures incurred.

2. Whether the Court of Claims' ultimate "finding" that respondent would have successfully completed the contract at a substantial profit can support its judgment where the findings of the evidentiary or primary facts are directly to the contrary.

STATEMENT

The Court of Claims' findings disclose the following pertinent facts:

In 1911, respondent, a Virginia manufacturing corporation, was incorporated and acquired a plant (at Waynesboro, Virginia), mainly built in 1890, which was equipped with certain machinery and equipment, to which respondent shortly added other used machinery (R. 16–17). From that time until about 1931, the plant was "actively engaged", but since 1931 it has been used for "minor engagements" only, requiring not more than four or five employees. In January, 1941, it had been idle for some years (R. 16–17). At that time, respondent's officers were engaged in other

businesses at or near Pittsburgh, Pennsylvania; one stockholder and director, who had been the plant's local manager when it was in operation and continued to be the company's local manager and statutory agent, was in the real estate business in Waynesboro (R. 17).

With the acceleration of the national defense program, late in 1940 and early in 1941, respondent's officers desired to procure a defense contract and in January 1941, engaged H. M. Johnson as assistant to the president and in February 1942, Gordon Kennedy, an engineer, as general manager (R. 17, 20) (*infra*, p. 7). Throughout the year 1941, Mr. Johnson actively sought a Navy contract for respondent. A conference was held in January 1941; in April, the company submitted a proposal for the manufacture of 500 three-inch 50-caliber gun mounts; sometime before July, it submitted a list of equipment owned by it or deemed available; in July, a representative of the Navy's Gun Mount Section inspected respondent's plant and also talked to Kennedy; in September, at a conference at the Bureau of Ordnance, the company was asked to furnish information as to its financial ability, commitments of subcontractors, and a detailed study of the machine tool operations, predicated upon a possible award of 150 three-inch 50-caliber mounts; on October 7, 1941, respondent submitted additional information; and on December 15, 1941, it slightly modified its previous proposals (R. 17).

At a meeting with the Navy's Bureau of Ordnance, on December 22, 1941, respondent's proposal as to prices, quantities, delivery schedule, payments and options for additional mounts was accepted as satisfactory, and respondent agreed to furnish a letter from a surety company indicating that a performance bond of the nature required by the Navy Bureau of Supplies and Accounts, the contracting agency, would be furnished (R. 17).

Respondent was then given a letter of intent, dated December 29, 1941, confirming the Navy's intent to place an order for the manufacture of 150 gun mounts, two to be delivered in May, 1942, three in June, 1942, five in July, 1942, and thereafter at least ten to be delivered per month. The letter authorized respondent "to purchase materials necessary for the production of the mounts and spare parts and to proceed with the production thereof in anticipation of the placing of the order * * *." If an order were not placed with respondent by April 1, 1942, the Government was to make reimbursement for all costs incurred and to assume all obligations for any commitments made (R. 17–18). This letter of intent was accepted by respondent on January 10, 1942, and then returned to the Navy Department (R. 18). Before this acceptance, respondent had received a Navy letter, dated January 7, 1942, stating that it was understood, pursuant to the agreement reached at the December meeting, that

no expenditures were to be made under the letter of intent "until such time as you furnish a letter from an approved surety company containing a firm commitment to act as surety on a performance bond in the event that a contract is executed" (R. 18).

No letter from a surety company having been received by January 29, 1942, the Navy advised respondent on that day that failure promptly to submit such a letter might result in the termination of the letter of intent. On February 3, 1942, respondent's representative submitted a letter in which the surety indicated that a performance bond in connection with a contract of this size would have to be reinsured and that unless some changes were made in respondent's financial set-up, reinsurance would be declined; but that if respondent accomplished either of two suggested refinancing plans[1] and also furnished certain information as to new key personnel to be engaged by it, reinsurance could be obtained and the surety company would execute the bond. Respondent's representative, who presented this letter to the Navy Department, testified that the official who received it said flatly that it was satisfactory; a

[1] Both the refinancing plans suggested by the surety company involved the investment of considerable additional money by respondent's stockholders. Plan I required, *inter alia*, $100,000 additional working capital and the personal responsibility of the controlling stockholders. Under Plan II, $200,000 additional working capital was to be added; no personal responsibility would then be required.

would probably have adversely affected its profits," the court's opinion cites the following factors as reason for believing that respondent would have made a profit: (a) Kennedy, the production manager, an able man, was willing to work for respondent at "a rather modest salary" ($1,000 per month), but with an arrangement for sharing in the profits (5%); (b) respondent's stockholders, who did not ask for government financing, must have anticipated a profit; and (c) "the consideration and tolerance with which the Government, during the time here in question, treated contractors actually engaged in producing defense material, if the contractor in good faith did his best to perform, is an indication that the plaintiff, if allowed to perform, would probably have succeeded in making a profit." (R. 25–26). Judgment was entered for $80,000 (R. 26).[2]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In disregarding its findings of the evidentiary or primary facts in making its ultimate finding that "If the plaintiff [respondent] had been per-

[2] The court refused to award judgment for respondent on a separate claim, not now involved, for the requisitioning of certain machinery, for which respondent had received payment in return for releases which were claimed below to have been invalid (R. 21–22, 26). Accordingly, the court found it unnecessary to pass upon the Government's counterclaim (R. 14–16), which was concerned solely with the separate claim decided against respondent.

mitted to perform its contract, it would have made a net profit of not less than $80,000." (R. 21).

2. In making an ultimate finding (i. e., that respondent would have made a net profit) which is not sustained by its findings of the evidentiary or primary facts.

3. In failing to make the finding that respondent had not proved that it could have successfully performed the contract and made a profit thereon.

4. In failing to hold that respondent had not proved that it suffered any legal damage from the Government's alleged breach of contract, and was therefore not entitled to recover.

5. In failing to hold that the Government could have properly terminated or cancelled respondent's contract, and that respondent was therefore not entitled to recover any unearned anticipated profits.

6. In awarding respondent a sum on account of unearned anticipated profits.

7. In entering judgment for respondent.

SUMMARY OF ARGUMENT

I

A. The Court of Claims' findings do not support its judgment, awarding respondent $80,000 for loss of anticipated profits. Its evidentiary findings, which alone may be looked to for support of its conclusions, do not support the ultimate finding that if respondent had been permitted to undertake performance of the contract, it would have made a net

profit of not less than $80,000. The contract here required that respondent deliver the first gun mounts within three months, ten gun mounts in the initial five months and thereafter ten a month until the full quota of 150 were delivered. The evidentiary findings show that the construction of gun mounts is difficult and exacting work, and that manufacturers experienced in somewhat similar work with large organizations and trained mechanics required from seven months to one year until they produced their first gun mounts. Hence, even if respondent had the experience, organization and trained mechanics, it probably would not have been able to make timely performance.

But respondent "was not prepared to undertake work of the character proposed by the contract and would not for an indefinite time be prepared successfully to complete a contract for 150 gun mounts" (R. 19). The court below found that respondent had no experience in the manufacture of gun mounts or in similar work; that it had no manufacturing organization capable of undertaking the work required by the contract; that it had no force of trained employees nor trained personnel to train unskilled employees, although it planned to use about 150 mechanics, skilled, semi-skilled and unskilled in the machining and assembling of the gun mounts; that its plant was not in condition forthwith to be used in the manufacture of gun mounts, in accordance with the award; and that although re-

spondent had planned to subcontract the manufacture of required cast steel forgings, all that it had done in that regard was to contact possible subcontractors. These evidentiary findings leave the court's conclusion that respondent would have performed the contract at a net profit of $80,000 standing bereft of all factual support, plainly overridden by the subordinate findings and therefore not sustainable in point of law. Thus, there is a complete absence of the clear and direct proof, necessary before anticipated profits may be awarded, that the contractor would have complied with its contractual obligations and would have made a net gain which could fairly be estimated without speculation. On the contrary, the subordinate findings conclusively demonstrate that respondent could not have discharged its obligations within the time prescribed by the contract and that it probably would have suffered a substantial loss, rather than earned a 4% profit.

B. The factors mentioned in the opinion of the court below, not only could not be utilized to rectify the deficiencies in the findings but indeed constitute a patently flimsy foundation for its judgment. The willingness of Kennedy (the intended production manager) to work for respondent at $1,000 a month plus 5% of the profit affords no support; there was nothing in the findings or the opinion as to why he decided to work for respondent, and there are any number of possible reasons, apart from the expectation that

government witness testified that he overheard the conversation and that it was to the effect that the letter would be considered to determine whether it was satisfactory (R. 18-19).

Respondent's plant was twice visited, in January and February, 1942, by government representatives. On January 16th and 17th, naval inspectors found no one at the plant except the watchman and the local manager; no work at all was being performed at that time. On February 19, 1942, a War Production Board naval ordnance production specialist found only the watchman at the plant; the local manager was called from his real estate office and accompanied the production specialist in inspection of the plant, and a conference was also had with Mr. Johnson who was called to Waynesboro for the purpose. Reports of both of these visits were given to the Navy Department (R. 19).

The Court of Claims found that on February 19, 1942, the respondent company was not prepared to undertake work of the character proposed by the contract, and would not for an indefinite time be prepared successfully to complete a contract for 150 gun mounts (R. 19). Respondent's foundry was incapable of producing the cast steel forgings required for the gun mounts. It was respondent's plan, known to the Government, to subcontract for these castings, as well as for other parts of the work. Respondent had contacted certain producers who were willing to

furnish castings and other parts. No actual contracts for castings or for any other parts had been made, but, the court found, there was no reason to suppose that the company could not have obtained these parts from subcontractors (R. 19). For the bulk of its labor supply, respondent expected to obtain former railroad shop mechanics residing near Waynesboro; its plans called for about 150 mechanics, skilled, semi-skilled, and unskilled, in the machining and assembling of the gun mounts (R. 19).

The Court of Claims also found that the construction of gun mounts is difficult and exacting work; that manufacturers experienced in somewhat similar work, with large organizations and trained mechanics, required from seven months to one year from the time of receiving notice to proceed from the Government until the first gun mounts were produced; that respondent had no manufacturing organization and no force of trained personnel to train unskilled employees; and that respondent's proposed general manager (Kennedy) was still, in February, 1942, a regular employee of another company in Ohio (R. 19–20). Kennedy had been assisting respondent in its plans under the expectation that he would sever his connection with the other company and become respondent's general manager; a contract between respondent and Kennedy, engaging him as general manager, was executed on February 24, 1942 (R. 20).

Under date of February 23, 1942, the Navy Department mailed to respondent a notice of award of contract, No. LL96553, for 150 gun mounts, in the amount of $2,087,555; the brief notice of award authorized respondent "to commence performance in accordance with the terms of your proposal," and indicated that a formal contract would later be forwarded for execution (R. 14, 20). This notice of award was received by respondent at Waynesboro on February 24, 1942 (R. 20). On the same day, after it had received the notice of award, respondent received a telegram from the Navy stating "notice of award contract nos. 96553 forwarded in error return for cancellation no award to you * * *" (R. 20.)

This error in sending out the notice of award came about because it was the practice in the Navy Department, after a letter of intent had been issued, for the relevant papers to be sent to the Award Section of the Bureau of Supplies and Accounts, which would—unless notified to the contrary—in due course mail out a notice of award. In this case, the letter of intent of December 29, 1941, was forwarded to the Award Section in routine fashion and that office, not having been informed otherwise, followed its usual practice and sent out the notice of award on February 23, 1942. The officials who had actual discretion to award the contract did not reach their conclusion to terminate negotiations with respondent until after

the routine notice of award had been forwarded without their knowledge, and the telegram of February 24, 1942, was sent in correction (R. 24). On March 5, 1942, the Navy followed up this telegram by mailing respondent a formal cancellation of the original letter of intent of December 29, 1941 (R. 20). No formal written contract was ever consummated. The present suit for alleged anticipatory breach of contract was instituted by respondent in the court below on June 21, 1944 (R. 1).

The Court of Claims held, first, that the notice of award (dated February 23, 1942) constituted a binding agreement, that the revoking telegram came too late, and that the Government had breached the agreement by cancelling it (R. 24–25). The court then proceeded to assess the damages attributable to this breach. It found that respondent had incurred no expenditures or expenses in reliance on the letter of intent or the notice of award of contract (R. 21, 26), but it concluded that "if the plaintiff had been permitted to perform its contract, it would have made a net profit of not less than $80,000." (R. 21, 26). This sum was reached by the court, avowedly acting as a jury (R. 26), on the basis of "about 4% of the gross contract price." (R. 26). Conceding that the respondent was "venturing into an untried field" and that it "would have had problems and difficulties that an active, going concern would not have had, and those difficulties

this contract would be profitable, for his decision. And in any case, such expectation is itself not evidence that the contract would in fact have been profitable. Similarly the fact that respondent's stockholders were, according to the court below, willing to finance performance, does not indicate that the contract would in fact have been profitable. Almost invariably, contractors expect contracts to be profitable, but such expectations all too frequently do not materialize. The period here involved was one of uncertainty so far as costs and profits in war contracts were concerned, and in many cases, it was impossible to tell, until completion of the contract, whether it would be profitable. Finally, there is no warrant in the record or in common knowledge to support the court's supposition that the Government's contracting officials would have shown such indulgence and aid that respondent would have emerged not only unmarred by default but possessed of a sizeable profit. In any case, the function of meting out this generosity has not been vested in the Court of Claims, whose jurisdiction is limited to awarding legal damages against the United States. *Smoot's Case*, 15 Wall. 36, 45–46.

II

A. The Government had the right to terminate respondent's contract without liability for unearned anticipated profits. Had a formal written contract been executed between respondent and the Navy Department, it probably would have

authorized the Government to terminate performance under the contract, without liability for unearned profits. The War Department had required the inclusion of a termination provision since September 1941, and the Navy Department similarly developed termination clauses late in 1941. The wording of these provisions varied from time to time but uniformly prohibited profits on uncompleted work. The existence of a right in the Government to terminate performance under the contract would wholly destroy respondent's demand for profits. At the least, the likelihood that the contract would have included such a termination clause adds a further speculative element to respondent's claim for unearned anticipated profits.

B. Any agreement which respondent made with the Navy was subject to the exercise of the wide and sweeping powers of modification conferred by Title II of the First War Powers Act as implemented by Executive Order No. 9001. By virtue of that Act, the Navy had the power to modify a contract "with or without consideration" and "irrespective of rights which may have accrued under the contract." Taken in its wartime context and considering past wartime experience, Title II must be construed as conferring the unilateral power on the part of the Government agency to terminate a contract without liability for unearned profits. The existence of the right to cancel, even though it is not availed of, is sufficient to bar recovery of prospective profits.

This construction of Title II accords with the other statutes of both World Wars dealing with the termination problem and closes the only gap in the deep-rooted and long-established policy against allowing war contractors to reap unearned profits. The discussion of the bill, which became Title II of the First War Powers Act, on the floor of Congress discloses an intention to remove various common law requirements which might hamper war procurement, including the requirement that a contractor must assent before his contract may be terminated without liability beyond his actual losses. Moreover, the Attorney General, in an opinion upholding the validity under Title II of bilateral terminations, plainly implies that unilateral action by the Government with respect to war contracts, including unilateral terminations, are also sanctioned.

It is difficult to say that the War and Navy Departments developed an administrative practice in regard to unilateral terminations. As far as they were concerned, that question was not of substantial practical importance since most contracts contained termination provisions and even in the absence of such a provision, the contractor almost invariably agreed to a settlement. So far as we are aware, the instant case is the only one in which the contractor sought to recover anticipated unearned profits on a terminated contract. Nor are the regulations and directives of the War and Navy Departments inconsistent with

our construction of Title II. The respondent's difficulty in regard to these documents is that it attempts to read these various documents, which uphold bilateral terminations, as holdings that bilateral action is the exclusive means of effectuating the termination of a contract.

ARGUMENT

In this case, the Court of Claims has awarded respondent a substantial sum for unearned anticipated profits as damages for breach by the Government of a war contract. This award was made, although as we show in Point I, the Court of Claims' own detailed findings conclusively demonstrate that respondent had suffered no damage and could not even have made proper and timely performance of its contract, let alone emerged from the venture profitably. Moreover, as we show in Point II, this gratuitous award has been allowed in the face of established statutory and administrative policy—in both World Wars—not to pay anticipated but unearned profits to contractors whose contracts were cancelled or terminated before completion. Accordingly, this case involves an unwarranted imposition of substantial damages upon the Government for the actions of its contracting officials which were proper in the circumstances and necessary in order to fulfill their responsibilities for the procurement of war supplies. It is for these reasons that the Government, believing that the decision below involved

so clear a departure by the Court of Claims from its proper functions as to warrant invocation of this Court's supervisory powers, sought review.

I

RESPONDENT WAS NOT ENTITLED TO ANTICIPATED PROFITS OF $80,000 AS DAMAGES FOR BREACH OF CONTRACT

The United States does not question in this Court the Court of Claims' holding that the notice of award sent by the Award Section of the Navy Department's Bureau of Supplies and Accounts created a binding contract between the United States and respondent on February 23, 1943 (R. 24).[3] For the purposes of this Point (see, *infra*, p. 35), it further accepts the finding that the Navy Department telegram received by respondent on February 24, the day following its receipt of the award, advising that the notice of

[3] The finding of the court below that a binding contract was consummated is, in our view, of doubtful soundness. Both during the trial and in its motion for a new trial in the court below, the United States urged that there was no contract between respondent and the Government inasmuch as there was no intent on the part of responsible naval officials to contract with respondent. That no contract was concluded has been the consistent view of the Navy Department in all its dealings with respondent in regard thereto. The Navy Judge Advocate General so held on June 16, 1942, on referral of the question to him at respondent's request, and respondent was so advised on July 17, 1942. The Navy Department War Contracts Relief Board on September 27, 1947, while this case was pending in the court below, denied respondent relief under the Act of August 7, 1946 (60 Stat. 902, *infra*, p. 46), on that ground.

award had been forwarded in error, constituted a breach of that contract (R. 25). There is no question here that the Court of Claims properly found that respondent incurred no expense or expenditure in reliance on the notice of award, and hence suffered no actual damage (R. 21, 25). The Government does urge, however, that the Court of Claims erred in finding that respondent would have made a profit of $80,000 and in awarding that amount as damages for loss of anticipated profits resulting from the breach of contract.

A. THE EVIDENTIARY FINDINGS DO NOT SUPPORT THE ULTIMATE DETERMINATION THAT RESPONDENT WOULD HAVE MADE A PROFIT OF NOT LESS THAN $80,000

1. It is established that the Court of Claims exercises "the functions of a jury in findings facts, equivalent to a special verdict, and with like effect." *Mahan* v. *United States,* 14 Wall. 109, 112; *Luckenbach S. S. Co.* v. *United States,* 272 U. S. 533, 539. Since a verdict cannot be sustained unless the findings extend to all material issues and include circumstantial facts sufficient to warrant the conclusion (*Chesapeake Insurance Co.* v. *Stark,* 6 Cranch 268, 273; *Prentice* v. *Zane's Administrator,* 8 How. 470, 484; *Barnes* v. *Williams,* 11 Wheat. 415), the Court of Claims' special findings must similarly support its conclusion. *Luckenbach S. S. Co.* v. *United States, supra; United States* v. *Smith,* 94 U. S. 214, 218; *Stone* v. *United States,* 164 U. S. 380, 382, 383; *United States* v. *Wells,* 283 U. S. 102, 120. Such support

may be drawn only from the special findings of fact; no aid may be sought from statements in the conclusions of law or the opinion. *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205–206; 303 U. S. 26, 28–29; *United States* v. *Seminole Nation*, 299 U. S. 417; *United States* v. *Pyne*, 313 U. S. 127, 130; *United States* v. *Causby*, 328 U. S. 256, 267; cf. Act of May 22, 1939, c. 140, 53 Stat. 752, formerly 28 U. S. C. 288. The judgment "may not be upheld as to any item that is not supported by definite findings of fact extending to all issues and which, unaided by statements in the court's conclusions of law or its opinion, are clearly sufficient to entitle plaintiff to recover." *United States* v. *Seminole Nation*, *supra*, at 422. A "deficiency in findings cannot be rectified by statements in the opinion." *United States* v. *Causby*, *supra*, at 267.

2. The evidentiary findings of the Court of Claims do not support its ultimate finding that if respondent had been permitted to undertake performance of the contract, it would have made a net profit of not less than $80,000 (R. 21).[*] The contract required respondent to begin delivering the gun mounts three months after the making of the award (by May, 1942), to produce and deliver at

[*] Although this ultimate finding is physically among the court's "Special Findings of Fact," it, of course, is not binding on this Court since, as we show in the text, it is inconsistent with the other facts found. *Hathaway & Co.* v. *United States*, 249 U. S. 460, 463. *United States* v. *Berdan Fire-Arms Co.*, 156 U. S. 552, 573.

least ten gun mounts within five months thereafter—two were to be delivered in May, 1942, three in June, 1942, and five in July, 1942—and to deliver at least ten a month until the full quota of 150 were delivered (R. 18). But the evidentiary findings conclusively disclose that respondent, if permitted to undertake performance, would have been unable to deliver as required, and probably would have incurred substantial loss.

As the Court of Claims found, "the construction of gun mounts is difficult and exacting work. Manufacturers experienced in somewhat similar work with large organizations and trained mechanics required from seven months to one year from the time of receiving notice to proceed until the first gun mounts were produced" (Fdg. 5, R. 19). Thus, even if respondent did have the experience, organization and the trained mechanics, it would not have been able to deliver gun mounts as required by the contract or to deliver the first gun mounts within three months of the award.

But, on the date of the award, respondent had no experience in the manufacture of gun mounts or in similar work. Respondent's previous work had been in fields far removed from the manufacture of gun mounts; it "had previously, for a time, been engaged in the manufacture of circular saws and had done work in connection with brake shoes and some other minor work" (Fdg. 2, R. 16). Nor did it have any

manufacturing organization capable of undertaking the work required by the contract (Fdg. 3, R. 19–20). Its executive officers in 1940 were engaged in other businesses in another city (Pittsburgh, Pennsylvania). There is nothing in the findings as to their qualifications or the qualifications of Mr. Johnson, who was engaged as assistant to the president in 1941 (Fdg. 3, R. 17). One officer and director, who was not a production expert, was engaged in the real estate business in Waynesboro, where the plant was located; "he had been the local manager of the plant when it was in operation, and continued to be its local manager and the statutory agent for the company thereafter" (Fdg. 2, R. 17). Mr. Kennedy, the proposed general manager (who was an engineer) was working elsewhere, as "a regular employee of another company" and was not actually hired until February 24, 1942, after the notice of award was received (Fdgs. 3, 5, R. 17, 20).

Similarly, respondent did not have any "force of trained personnel to train unskilled employees" (Fdg. 5, R. 20). Nor, for that matter, did respondent have any actual force of mechanics or workers, although it planned to use about 150 mechanics skilled, semi-skilled and unskilled in the machining and assembling of the gun mounts (Fdg. 5, R. 19). It "expected" to recruit its labor force from among former railroad shop mechanics in the vicinity (Fdg. 5, R. 19–20). No such recruiting had apparently taken place

even shortly before the award was received. When inspectors from the Navy Department's Philadelphia Inspection District visited the plant on January 16 and 17, 1942, "there was no one at the plant except the watchman and the local manager. No work at all was being performed at the time" (Fdg. 5, R. 19). And as late as February 19, 1942, four days before the award, when a WPB production specialist visited the plant, "only the watchman was at the plant. The production specialist inspected the plant with the local manager, who was called from his real estate office, and also talked with Mr. Johnson, who was called to Waynesboro for that purpose." (Fdg. 5, R. 19.)

Moreover, respondent's plant was in no shape forthwith to be used in the manufacture of gun mounts, in accordance with the award. The plant itself had been idle for some years; it had not been actively engaged since 1931, "since which time it has been used for minor engagements only, requiring not more than four or five employees" (Fdg. 2, R. 17). Certain plant expenditures had been made in 1940 and early 1941 in connection with respondent's endeavor to secure Navy work, but most of these were "in the nature of routine maintenance" and none involved equipment or material specifically pertinent to the instant contract (Fdg. 7, R. 21). In addition, respondent's "foundry was incapable of production of the cast steel forgings required for the gun mounts" (Fdg. 5, R. 19). And, although its plan was to subcon-

tract for these castings, as well as for other parts of the work, no such subcontracts had yet been made. All that respondent had done in regard to obtaining parts was to contact certain producers who were willing to furnish castings and other parts (Fdg. 5, R. 19). Thus, the Court of Claims stated, respondent, when it received the award, "was not prepared to undertake work of the character proposed by the contract, and would not for an indefinite time be prepared successfully to complete a contract for 150 gun mounts" (Fdg. 5, R. 19).[4]

These evidentiary findings compel, we submit, the conclusion that respondent could not have delivered two gun mounts in May, 1942, three months after the award, three gun mounts in the following month, five in the next month and thereafter ten monthly until 150 were delivered as required by the award. They leave the determination that respondent nevertheless "would have made a net profit of not less than $80,000" standing bereft of all factual support, plainly inconsistent with the "subordinate or circumstantial findings" and therefore not sustainable "in point of law."[5]

[4] In the light of the foregoing, it may well be doubted that respondent could have met the conditions required by the surety company before it would execute the performance bond which the Navy had definitely decided to require in this instance (R. 17–19, 20).

[5] On the basis of primary findings almost identical with those adopted below, the Commissioner of the Court of Claims rationally concluded that "the evidence does not establish that plaintiff could have successfully performed the contract nor made any profit thereon."

United States v. *Esnault-Pelterie*, 299 U. S. 201, 205–206; 303 U. S. 26, 31; *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533, 540.

Assuming, as the Government does in this Point, contrary to respondent's impression (Br. in Opp. 11) that anticipated profits might be awarded a contractor for breach of a Government contract, respondent does not make out a case, on the special findings of the Court of Claims, justifying such recovery here. "The authorities both in the United States and England are agreed that, as a general rule, subject to certain well-established qualifications, the anticipated profits prevented by the breach of a contract are not recoverable in the way of damages for such breach." *Howard* v. *Stillwell and Bierce Mfg. Co.*, 139 U. S. 199, 205–206. Before recovery of anticipated profits may be allowed, the contractor must show by clear and direct proof that it would have complied with its contractual obligations and the result would have been a net gain which could fairly be estimated without speculation. *Howard* v. *Stillwell and Bierce Mfg. Co.*, 139 U. S. 199, 206; *United States* v. *Behan*, 110 U. S. 338, 344; *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 549; *White River Levee District* v. *McWilliams Dredging Co.*, 40 F. 2d 873, 876–877 (C. C. A. 8); *Dyal* v. *Wimbish*, 124 F. 2d 464, 467 (C. C. A. 5); *Polar Steamship Corp.* v. *Inland Overseas Steamship Corp.*, 136 F. 2d 835, 840–841 (C. C. A. 4), certiorari

denied, 320 U. S. 774; *Suburban Contracting Co. v. United States*, 76 C. Cls. 533, 544; American Law Institute, *Restatement of Contracts*, sec. 331.[6]

It should be noted that a basic prerequisite to recovery of anticipated profits is that the plaintiff be in a position to discharge fully his contractual obligation. In the present case, respondent has failed to show that it would have fully discharged its obligations within the time prescribed in the contract. On the contrary, the special findings explicitly state that it could not have so performed. And, in light of this inability to fulfill its contract, the question whether it would have earned a profit on the contract passes beyond the area of fair estimation into the realm of pure speculation. Cf. *White River Levee District* v. *McWilliams Dredging Co.*, 40 F. 2d 873, 876–877 (C. C. A. 6);[7]

[6] Other exceptions to the rule against the recovery of anticipated profits—clearly inapplicable here—are "where from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into." *Howard* v. *Stillwell and Bierce Mfg. Co.*, *supra*; *United States* v. *Behan*, *supra*.

[7] "The evidence falls short of 'that clear and direct proof which the law requires' of a future profit or of the amount thereof. One side of the evidence is that this contract required excavation of 80,000 cubic yards each month and completion, in thirty months, of the estimated 2,400,000 cubic yards of excavation; that at the end of fifteen months only 290,841 cubic yards had been excavated; that the new and only dredge on the work could not possibly complete the work in contract time; that the work, up to cancellation, had been at a loss. The other side of the evidence is that other

C. W. Henning & Co. v. *Suncrest Lumber Co.*, 51 F. 2d 945, 948–949 (C. C. A. 4); *Haddad* v. *Western Contracting Co.*, 76 F. Supp. 987, 990 (N. D. W. Va.). Indeed, the Court of Claims' special findings demonstrate that it is more probable that respondent would have suffered a substantial loss, rather than earned a 4% profit. Respondent was not experienced in the manufacture of gun mounts or similar work—it also was without an organization and trained staff—and even experienced concerns having the organization and staff, typically required substantially longer than three months—the period set by the award here—to deliver the first gun mounts. Cf. *Palmer* v. *Connecticut Ry. Co.*, 311 U. S. 544, 559; *Greenwood County* v. *Duke Power Co.*, 107 F. 2d 484, 488 (C. C. A. 4).

B. THE OTHER FACTORS SET OUT IN THE OPINION ALONE CANNOT AND DO NOT SUPPORT THE JUDGMENT

Although "the deficiency in [its] findings cannot be rectified by statements in the opinion" (*United States* v. *Causby*, 328 U. S. 256, 267; *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 206; *United States* v. *Seminole Nation*, 299 U. S. 417, 422; *United States* v. *Pyne*, 313 U. S. 127, 130, see *supra*, pp. 19–20), the Court of Claims in its opinion, points to factual considerations, not re-

dredges could have been put to work, and that the profit on the work to be done would have been at the various figures put by several witnesses. In the face of the undisputed condition at the time of cancellation, we are not justified in assessing substantial damages upon the bare estimates as to future happenings." 40 F. 2d at 876–877.

flected in its findings as support for its judgment. But these considerations, (1) that Kennedy (the production manager) was willing to work for respondent at a "rather modest salary" with a 5% share in the profits (R. 25), (2) that the stockholders who did not ask for Government financing, "must have anticipated that the contract would produce a profit" (R. 25), and (3) that the Government treated defense contractors at this time with "consideration and tolerance" if they did their best to perform (R. 25), plainly provide only the flimsiest of foundations, especially in contrast to the impressive firmness of the detailed findings (*supra*, pp. 20–24) which the court brushed aside with the assertion that respondent "would have had problems and difficulties that an active, going concern, would not have had, and those difficulties would probably have adversely affected its profits" (R. 26). As we have already stated (*supra*, pp. 24, 27), these findings demonstrate not, as respondent suggests (Br. in Opp. 9), that the difficulties would reduce respondent's profits, but rather that respondent could not have rendered timely performance of its contract and that it was highly doubtful whether 150 gun mounts would ever have been produced even at a loss.

1. Kennedy's willingness to work for respondent for a "modest" salary with a 5% share in the profits affords no support for the court's judgment despite the court's edict that this "is sub-

stantial evidence that one expert who had studied the situation carefully anticipated that the performance would produce profits" (R. 25). There is nothing in the findings or opinion as to why Kennedy decided to leave his old position to work for respondent, or as to his previous salary. He may have been dissatisfied with his former position and, even if he were satisfied, there may well have been reasons other than the expectation that this contract would be profitable which influenced him to work for respondent. For instance, $1,000 a month (the "modest" salary respondent agreed to pay Kennedy) may have been more than he had been earning, even without the added 5% of the possible profits, and might alone have been the governing consideration. Furthermore, both respondent and Kennedy undoubtedly contemplated that respondent would be awarded additional war contracts as well, which over-all might have been profitable. In these highly speculative circumstances, the bare fact of Kennedy's acceptance of the position with respondent is no evidence that he expected that this particular contract would be profitable, much less that in fact it would be profitable.

2. The facts that respondent's stockholders were willing to finance performance, without asking for any advance from the Government,[8] and that

[8] It is to be noted here that the surety company would not give respondent a performance bond unless substantial additional working capital ($100,000 under Plan I and $200,000

they anticipated that the contract would be profitable, do not support the court's conclusion that, *ergo*, the contract would be profitable. This proposition proves too much; in virtually all instances where a person enters into a contract, he does so in the expectation or hope that it will be profitable, but it is commonplace that such expectations or hopes all too frequently do not materialize. Profit, by definition, is the compensation paid for the assumption of risk, and although competent businessmen, in entering upon a contract, hope to make a profit—the greater the risk, the higher the possible profit they will demand—they realize that they might nevertheless incur a loss. Indeed, the War Department's experience as of September, 1943, was that between six and seven percent of the contracting companies lost money on their war business. See Hearings before House Committee on Ways and Means on H. R. 2324, 2698, 3015, 78th Cong., 1st sess., p. 94. The greater proportion of these losses was in connection with, as in the present case, performance under the company's first war contract. See Fain and Watt, *War Procurement—A New Pattern in Contracts*, 44 Col. L. Rev. 127, 211–212.

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under Plan II) (*supra*, p. 5, fn. 1), was invested by respondent's controlling stockholders. There is nothing in the findings below which even suggest that respondent's stockholders were either willing or able to invest this additional money.

Moreover, the period here involved (late 1941 about the time of Pearl Harbor, and early 1942) was one of unusual uncertainty as far as costs and profits were concerned. As stated by General Somervill, Commanding General, Services of Supply, War Department (Hearings before Subcommittee of the Senate Committee on Appropriations on H. R. 6868, 77th Cong., 2d sess., p. 24):

> We are asking contractors to produce articles which have never been produced before. We are asking other contractors to produce articles which they have never produced before. We are asking still other contractors who have produced articles in small quantities, to produce them in vastly larger quantities. The result of this is that neither the contractors nor the contracting officers can make an accurate forecast of the cost of performance.
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> * * * * *
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> The plain fact of the matter is that in many cases it is impossible to tell, until completion of the contract, whether the contractor suffers a heavy loss, or makes a large profit.[9]

[9] This fluidity of the cost and profit situation in war contracts, at the time of respondent's award, makes manifest the essential weakness of the evidence which was adduced at the trial and with which respondent seeks to bolster the judgment below (Br. in Opp., pp. 6, 11–12). This evidence, respondent asserts, included "complete cost accounting data and engineering manufacturing estimates upon which the contract was negotiated" and shows, it claims, that it would have

See also, Affidavit of H. Struve Hensel, formerly Assistant Secretary of the Navy (included in transcripts of record in *Pownall* v. *United States*, 334 U. S. 742, October Term, 1947, No. 74, R. 104, 120–129, and *Alexander Wool Combing* v. *United States*, 334 U. S. 742, October Term, 1947, No. 95, R. 177, 187–193);[10] Marbury & Bowie, *Rene-*

made a net profit of from 8% to 10% of the contract price. In addition, that evidence was predicated on the theory that the contract would be fully performed on time, the fallacy of which is revealed by the court's findings of fact. In any case, such evidence is here irrelevant, for as we have shown (*supra*, pp. 19–20), the court's findings of fact alone may be looked to for support of the court's judgment.

Respondent's further effort to bolster the judgment below by relying on the finding below that a binding contract had been consummated as showing that the Navy Department (together with respondent) expected that the contract could be completed at a profit (Br. in Opp., p. 8), is likewise unsound. During this period, Navy personnel were more interested in getting munitions than in whether contractors earned a profit. See Hensel Affidavit (cited in the text (No. 74, p. 108; No. 95, p. 179)). This suggestion further ignores the fact that the contract, if any, was consummated not as a result of a decision of the responsible contracting officers, but because administrative machinery, having been set in action, inexorably ground out an award. That the responsible naval officials clearly were not certain that respondent would perform satisfactorily is evident from the requirement of a performance bond in this instance, from the prompt notification not to proceed, and from the instructions issued to respondent, contrary to the usual practice, not to incur any expenses in connection with the letter of intent (Fdg. 4, R. 18).

[10] This Court may properly take judicial notice of this affidavit as an official statement by an authorized representative of the Navy Department, contained in the records of the Court. Cf. *United States* v. *Pink*, 315 U. S. 203, 216.

gotiation and Procurement, 10 Law and Contemporary Problems 218, 219.

3. Finally, the court below attributes an extraordinary function to the Government's presumed "consideration and tolerance" for war and defense contractors. As counterbalances to its findings which, as we have shown, demonstrate that respondent could not have rendered timely performance of its contract and makes it highly doubtful whether the 150 gun mounts would ever be produced even at a loss (see, *supra*, p. 27), the court poses the singular, and unproved hypothesis that the Government's contracting officials would have shown such indulgence and aid that respondent would have emerged from its venture, not only unmarred by default but possessed of a sizeable profit. Nothing in the record or in common knowledge supports this supposition of unmeasured generosity." Even if this supposition were sustained by the finding or by the general knowledge of those times, the function of meting out that generosity has not been vested in the Court of Claims. That court has

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[11] The Navy Department Procurement Directive of July 7, 1943 (as amended) points out, in regard to modifications under Executive Order No. 9001 (*infra*, p. 42), that "carelessness and looseness on the part of the contractor * * * cannot be encouraged and overwhelming generosity to careless contractors, no matter how great the risk of inducing some lack of cooperation, will not facilitate the prosecution of the war." Navy Procurement Directives (Navy Department), par. 11,453.

jurisdiction to entertain suits against the Government for breach of contract, express or implied (28 U. S. C. 1491, formerly 28 U. S. C. 250), and it is established that an "implied contract" must be "one implied in fact and not one based merely on equitable considerations and implied in law." *United States* v. *Minnesota Investment Co.*, 271 U. S. 212, 217; *Goodyear Co.* v. *United States*, 276 U. S. 287, 293; *Sutton* v. *United States*, 256 U. S. 575, 581; *Merritt* v. *United States*, 267 U. S. 338, 341. Clearly, therefore, there is no warrant for elevating the Government's acts of grace in overlooking defaults and providing extra-contractual aids to the dignity or stature of a legal right, on the basis of which respondent may recover anticipated profits in the Court of Claims. In the very beginning of the history of the Court of Claims, this Court strongly warned against founding contract claims on the Government's "magnanimity and generosity." *Smoots Case*, 15 Wall. 36, 45–46. This Court there stated:

> There is in a large class of cases coming before us from the Court of Claims a constant and ever recurring attempt to apply to contracts made by the government, and to give to its actions under such contracts, a construction and an effect quite different from those which courts of justice are accustomed to apply to contracts between individuals. There arises in the mind of parties and counsel interested for the in-

> dividual against the United States a sense of the power and resources of this great government, prompting appeals to its magnanimity and generosity, to abstract ideas of equity coloring and even the closest legal argument. These are addressed in vain to this court * * *.
>
> It would be very dangerous, indeed, to the best interests of the government * * * if * * * that court, or this, should depart from the plain rule laid down above, and render decrees on the crude notions of the judges of what is or would be morally right between the government and the individual.

II

THE GOVERNMENT HAD THE RIGHT TO TERMINATE RESPONDENT'S WAR CONTRACT WITHOUT LIABILITY FOR UNEARNED ANTICIPATED PROFITS

In Point I, we assumed that the Navy's telegram of February 24, 1942, advising respondent that the notice of award had been forwarded in error, constituted a breach of contract, for which respondent on a proper showing, which we have demonstrated was not made here (*supra*, pp. 20–27), would have been entitled to recover as damages full anticipated profits. We urge in this Point that under the contractual provisions then in common use by the Navy as well as under the applicable law, the Government had the right to terminate respondent's contract without liability for unearned profits.

A. HAD A FORMAL CONTRACT BEEN ISSUED THE RESPONDENT, IT WOULD PROBABLY HAVE AUTHORIZED THE GOVERNMENT TO TERMINATE WITHOUT LIABILITY FOR UNEARNED PROFITS

In this case, no formal written contract between respondent and the Navy Department, in regard to the subject matter here involved, was ever executed. All that happened here was that the Navy Department issued to respondent a letter of intent which did not permit respondent to incur any costs in reliance thereon, and thereafter it issued a notice of award which was immediately withdrawn before respondent took any action thereon. Had a formal written contract detailing the rights and liabilities of the parties been executed as is typically done in Government procurement and was here contemplated, it probably would have contained a provision authorizing the termination of the contract for the convenience of the Government. Under that provision, the Government would have been liable not for the full profits which respondent might have earned upon full performance but only for profits on the work actually performed. Of course, respondent would have been required to execute the formal contract when it was tendered as this was implicit in the negotiations leading up to the contract.

During most of World War II,[12] both the War and Navy Departments, two of the principal war

[12] The practice of inserting termination provisions in war and defense contracts did not originate in World War II. Many of the contracts entered into late in World War I con-

procurement agencies, required supply contracts as large as that awarded to respondent to include a termination clause permitting the Government to terminate performance at any time.[13] The wording of these clauses varied and they were often revised, but, from the beginning, their provisions were uniform in prohibiting profits on uncompleted work. Hearings before the House Committee on Military Affairs on H. R. 3022, 78th Cong., 1st sess., pp. 22–26 (termination provisions used by War Department early in World War II), 27–34 (termination provisions used by Navy Department early in World War II) 35–37,[14]

tained a provision reserving the right to terminate the contract for the convenience of the Government. The termination clause in the standard form contract adopted by the War Department in September 1918 provided, *inter alia*, that the contract could be cancelled in whole or in part and that no profits would be allowed on the cancelled portion of the contract. See Edwards, *Cancellation of War Contracts: Plans and Practice, 1918–1919*, United States Bureau of Labor Statistics, Division of Historical Studies of Wartime Problems (1945), pp. 5–6.

[13] The United States Maritime Commission, the third of the principal war procurement agencies, also has had clauses providing for the termination of contracts "ever since [its] program has been in effect." See Hearings before Subcommittee of the Senate Committee on Military Affairs on S. 1268, S. 1280, and S. J. Res. 80 ("Problems of Contract Termination"), 78th Cong., 1st Sess., pp. 190–191 (testimony of Lt. Commander W. S. Brown, Ass't General Counsel of the Maritime Commission); pp. 194–201 (typical termination provisions used).

[14] Mr. MARTIN: Do I understand * * * that anticipated profits are not allowed?

(Continued on p. 38)

43–46, 562; Uniform Termination Article for Fixed-Price Supply Contracts, 9 Fed. Reg. 478–480, 13400; Joint Termination Regulations (adopted by the War and Navy Departments, October 1944) secs. 533–533.4, 541–541.5, 9 Fed. Reg. 13361–2, secs. 45.533 *et seq.*; Office of Contract Settlement Regulation No. 7, 32 C. F. R. 1944 Supp. 8006, 3 (c) p. 8065;[15] see Malman, *Policies and Procedures for the Termination of War Contracts*, 10 Law and Contemporary Problems, 449, 452–459, 487–492. In 1941, the War Department, which had decentralized its procurement program, issued formal directives to its contracting officers located throughout the country requiring them to include a prescribed termination provision in all supply contracts, "except (a) contracts to be completed in six months or less for an amount less than $500,000 and (b) contracts for an amount less than $50,000, regardless of the date of completion" entered into after September

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Colonel CUTTER: Anticipated profits are not allowed, but a profit is allowed on so much of the work which is in process as has actually been done.

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The CHAIRMAN: No anticipated profit has been allowed on the termination of those contracts?

Colonel CUTTER: That has been the principle by which they have been guided. * * *

[15] "Profit should be limited to preparations made and work done for the terminated portion of the contract; but, subject to this limitation, any reasonable method of arriving at a fair profit may be used."

16, 1941.[16] War Department Procurement Regulation No. 3, par. 324.1; War Department Supply Contract Form No. 1; see Malman, *supra*, pp. 452–453; Goldman, *Termination of War Department Contracts at the Option of the Government*, 42 Michigan L. Rev. 733, 740.

The Navy Department similarly developed termination provisions and provided for their inclusion in lump sum contracts early in World War II. See House Hearings on H. R. 3022, *supra*, pp. 27–34. The Navy Department first developed "standard termination clauses for fixed price contracts * * * late in 1941 * * * [which clauses] in general form and substance have been inserted in most contracts entered into since that time except for shipconstruction contracts, which constitute a separate problem." Senate Hearings on S. 1268, S. 1280, and S. J. Res. 80, *supra*, pp. 553, 271 (letter from Acting Secretary of the Navy dated October 10, 1943); Hensel Affidavit, *supra*, p. 32 (R. 174, No. 74, October Term, 1947; R. 224, No. 95 October Term, 1947); Office of Contract Settlement, *A History of War Contract Termination and Settlements* (July, 1947), p. 1.[17] These ter-

[16] Originally, the termination provision was made mandatory in all lump sum supply contracts. But, on August 14, 1942, the rule was relaxed as stated in the text. The amount of the contract award here involved exceeded $2,000,000 (R. 20).

[17] Although as respondent points out (Br. in Opp., p. 16), the Navy first issued a formal directive in regard to the inser-

mination clauses reserved a right in the contracting officer to discontinue the contract whenever he determined that termination was "for the best interest of the Government." See House Hearings on H. R. 3022, *supra*, p. 27. And in the event of such cancellation, the termination clause provided that "the Navy would pay the contractor for all costs, including a proper allocation of overhead expenses to the contract, incurred up to the time of termination, plus an allowance of 6% or 7% profit on all such costs except purchases of materials and unfurnished goods, for which the contractor was reimbursed at cost. This provision differed from the clause then used by the Bureau of Ships and the Army, which calculated the profit on the estimated extent of completion of the contract—the contractor was paid a percentage of the total profit equal to the percentage of completion." Hensel Affidavit, *supra* (R. 177, No. 74; R. 227, No. 95).

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tion of termination clauses in 1944 (Navy Contract Termination Directive No. 1 of February 28, 1944, reproduced in Hearings before House Committee on Naval Affairs on H. R. 4469, 78th Cong., 2d sess., pp. 1492–1499), the Navy Department, unlike the War Department, had kept its procurement activities centralized in Washington, and, hence, most instructions relative to contracts were in the form of individual directives by the Under Secretary to the Bureau Chiefs who transmitted such instructions to the officers under them responsible for preparing contracts. House Hearings on H. R. 3022, *supra*, p. 29, (testimony of Mr. John Kenney, then Assistant Chief, Procurement Legal Division, Office of Under Secretary of the Navy); see Hensel affidavit, *supra*, p. 32, (R. 173, 174, No. 74; R. 224, No. 95).

It is probable, therefore, that respondent's formal written contract (which would have been entered into sometime after February 24, 1942) would have contained a termination provision, authorizing the Government to discontinue respondent's performance at any time for any reason. With such a provision, the Navy could have stopped performance because of dissatisfaction with respondent as a contractor, just as it actually did, without making the United States liable for anticipated but unearned profits. The existence of a right in the Government to terminate performance under the contract would wholly destroy respondent's demand for profits. At the least, the likelihood that respondent's contract would have expressly permitted such a termination adds a further speculative element to respondent's claim for unearned anticipated profits and further impairs respondent's already weak claim to have shown its loss of profits by the required "clear and direct proof." Of course, under the termination clause, respondent would recover any expenses incurred under the contract, but here no such expenses were shown.

B. INDEPENDENTLY OF CONTRACTUAL PROVISION, THE FIRST WAR POWERS ACT AUTHORIZED THE GOVERNMENT TO TERMINATE RESPONDENT'S CONTRACT WITHOUT LIABILITY FOR UNEARNED PROFITS

Regardless of contractual termination clauses, the Government's contracting officials were, we submit, statutorily authorized in February 1942 and thereafter to terminate respondent's perform-

ance without subjecting the United States to liability for anticipatory profits. Title II of the First War Powers Act (Act of December 18, 1941, c. 593, sec. 201, 55 Stat. 839, 50 U. S. C. App. 611) authorized the President, or his delegate "to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made * * * without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate prosecution of the war." Executive Order No. 9001 (December 27, 1941, 6 Fed. Reg. 6787, 3 C. F. R. 1941 Supp., pp. 330–332), delegated this authority to the Navy Department, as well as the War Department and the Maritime Commission,[18] and specifically stated that "amendments and modifications of contracts may be with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished hereunder, irrespective of the time or circumstance of the making of or the form of the contract amended or modified, of the amending or modifying con-

[18] The President, by other executive orders, delegated his powers under Title II to the various other agencies engaged in war procurement. See, *e. g.* Executive Orders Nos. 9023, 9269, 7 Fed. Reg. 302, 9265 (Treasury Department, Department of Agriculture, Federal Works Agency, National Advisory Committee for Aeronautics, Panama Canal and Government Printing Office); Executive Order 9055, 7 Fed. Reg. 964 (Department of Interior); Executive Order No. 9058, 7 Fed. Reg. 983 (Tennessee Valley Authority).

tract, and irrespective of rights which may have accrued under the contract, or the amendments or modifications thereof." Any agreement which respondent entered into with the Navy was subject to the exercise of the wide and sweeping powers of modification conferred by the statute and the Executive Order, including the power to modify the contract "with or without consideration" and "irrespective of rights which may have accrued under the contract." Taken in its wartime context and considering past wartime experiences, this must be construed as conferring the unilateral power on the part of the government agency to terminate the contract, obligating the United States to pay only for work done, disbursements made, and obligations incurred.

If the Government was authorized to cancel the contract by a termination provision in the formal agreement, or, as we now show, by Title II of the First War Powers Act, it is immaterial that the Navy did not at first seek to cancel or terminate performance but insisted that no contract had been consummated.[19] It is the substance of the Government's action rather than the form of words, which controls the issue of liability. In *College Point Boat Corp.* v. *United States*, 267 U. S. 12, 15–16, this Court refused to allow antici-

[19] The Navy's letter of March 5, 1942 (R. 20) constituted a cancellation of the letter of intent (dated December 29, 1941) and was clearly intended to terminate all contractual arrangements.

pated profits, as for a breach, where the United States did not purport to cancel the contract under the 1917 Act, but ordered a work stoppage which apparently constituted an anticipatory breach. There, the existence of the right to cancel, even though not availed of, was held sufficient to bar recovery of prospective gain. See, also, *Newark Sash & Door Co., Inc.* v. *United States*, 107 C. Cls. 606, 625.

1. The construction of Title II as conferring the power unilaterally to terminate a war contract without liability for anticipated profits is in accord with the other statutes dealing with the termination problem and closes the only gap in the deep-rooted and long-established policy against allowing war contractors to reap unearned profits. In World War I, this policy was reflected in the Act of June 15, 1917, 40 Stat. 182, and in the Dent Act of 1919 (40 Stat. 1272) which expressly barred award of "prospective or possible profits." The Act of June 15, 1917, empowered the President to "modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material" upon the payment of "just compensation." Both this Court and the Court of Claims has held that under that Act, the contract could be terminated unilaterally and that the contractor was not entitled to recover anticipated profits. *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, 523–524; *Barrett Co.* v. *United States*, 272 U. S. 227, 235;

Meyer Scale & Hardware Co. v. *United States*, 57 C. Cls. 26, 50; *Hetrick Mfg. Co.* v. *United States*, 62 C. Cls. 265, 270. As stated in *Russell Motor Car Co.*, 261 U. S. at 523:

> The contract, we must assume, was entered into with the prospect of its cancellation in view, since the statute was binding and must be read into the contract. The possible loss of profits, therefore, must be regarded as within the contemplation of the parties.

The same rule was applied to war contracts made prior to the enactment of this Act, on the ground that they were necessarily subject to Congress' power to enact such legislation. *De Laval Co.* v. *United States*, 284 U. S. 61, 73.

In World War II, the termination provisions used by the war contracting agencies since late 1941 uniformly disallowed anticipated profits in terminated contracts. *Supra*, pp. 37–38. The same policy against unearned profits was embodied in the Contract Settlement Act (Act of July 1, 1944, 58 Stat. 649, 41 U. S. C. 101, *et seq.*), which Act, respondent concedes (Br. in Op., p. 22), permits unilateral termination. Section 6 (d) (5) of that Act required war contracting agencies to take into account, in settling terminated contracts, "such allowance for profit on the preparations made and work done for terminated portions of the war contract as is reasonble under the circumstances." And Regulation No. 7 of the Office of Contract Settlement pro-

vided: "Profit should be limited to preparations made and work done for the terminated portion of the contract * * *." 32 C. F. R., 1944 Supp., sec. 8006.3 (c), p. 3065. Similarly, the Act of August 7, 1946, c. 864, 60 Stat. 902, authorizing the departments and agencies "to consider, adjust, and settle equitable claims of contractors," limited the amount of the claim which could be so adjusted to "losses (not including diminution of anticipated profits) incurred * * *." As summarized by the Office of Contract Settlement, "The policy of the Government forbade the allowance of profit on that part of a canceled commitment on which no expenditures had been made and no work had been done. Industry and Government generally agreed that on termination the contractor should not receive the entire profit which he would have realized from performing the terminated portion, but rather that his profit allowance should be reasonable in relation to the work done and preparation made on the terminated portion of the contract up to the date of termination." Office of Contract Settlement, *A History of War Contract Terminations and Settlements* (July 1947), p. 27. Thus, unless Title II authorized unilateral termination, the United States would, contrary to this deep-rooted legislative and administrative policy, be liable for unearned profits in terminating a war contract.

2. That Title II was sufficiently broad in scope to permit such termination without lia-

bility for unearned profit is clear from its legislative history. The House Report (H. Rep. 1507, 77th Cong., 1st sess., p. 2), states that Title II "empowers the President, whenever he deems such action would facilitate the prosecution of the war, to authorize agencies to enter contracts with a maximum of speed"; and that it "liberalizes existing statutes relating to procurement and permits elimination of restrictions so as to give the procurement agencies the flexibility they need in the procurement of war matériel."

The debates on the floor of Congress similarly stressed the scope of the powers which Title II vested in the President. Several members of the House Committee referred to Title II as "new," "far-reaching," the "vital part" giving "great power," and taking "the lid off entirely." 87 Cong. Rec. 9838–9844. In the Senate, Senator Taft acknowledged that the "language is so clear that there can be * * * not the slightest doubt that this does change the contract laws as well as merely the procedure of making contracts." 87 Cong. Rec. 9839. Senator Vandenberg commented that Title II was "a complete, blanket authority to the President * * * to authorize any department to do anything it pleases in respect to war contracts * * * and at any price." 87 Cong. Rec. 9842. Senator Van Nuys (Chairman of the Senate Committee) said that it "goes beyond the power granted to President Wilson." 87 Cong. Rec. 9838. "The

object," said Senator Barkley, "is to give the departments or the President * * * more flexibility not only in making contracts but in the necessary modification of them if it becomes necessary to modify them in the interest of the Government or in the interest of national defense." 87 Cong. Rec. 9840. Senator Danaher, a member of the Senate Committee, said "our whole effort was designed * * * to provide for the modification of contracts whenever the President deems such action will facilitate the prosecution of the war." 87 Cong. Rec. 9839.[20] In view of these statements as to the breadth of the powers vested in the President by Title II, that Title may, we believe, reasonably be construed to eliminate the common-law requirements as to the contractor's assent before the contract may be terminated, and hence to authorize the President, or his delegate, unilaterally to terminate performance under a contract in the interest of national defense conditioned only on the payment of actual losses incurred by the contractor.

3. The Attorney General's interpretation of the broad and liberal grant contained in Title II, as extending the dispensing power not only to statu-

[20] For more detailed resumes of the legislative history, see 40 Op. Atty. Gen. No. 53, August 29, 1942: Kramer, *Extraordinary Relief for War Contractors*, 93 U. of Pa. L. Rev. 357; Rowley, *The First War Power Act Cases* (appearing in Shepherd, *Cases and Materials on the Law of Contracts* (2d Ed. 1946), pp. 1233–1238. Fain and Watt, *War Procurement, A New Pattern In Contracts*, 44 Col. L. Rev. 127, 194, *et seq.*

tory contracting requirements but also to common-law principles of contract law such as those involving consideration, envisages the grant as including the power unilaterally to terminate contracts without liability for anticipated profits. 40 Op. Atty. Gen. No. 53, August 1942. That opinion was issued in response to an inquiry from the Secretary of War as to the propriety, under Title II, of certain actions he proposed to take. He proposed, *inter alia*, to issue an order in regard to the amendment and modification of contracts, which read in part: "Whenever, in the judgment of the Commanding General, Services of Supply * * * the prosecution of the war is thereby facilitated, [he shall have power] to amend or modify contracts heretofore or hereafter made for the purpose of * * * (c) protecting contractors from the consequences of unforeseen or unexpected events, (d) adjusting contracts to new conditions and circumstances, including those created by the rules, orders, instructions, and determinations of Government departments, or (e) for any other purpose for facilitating the prosecution of the war." In holding that such an order was within the scope of Title II, the Attorney General commented (p. 9):

> In passing the First War Powers Act, the Congress desired to enable you, and the contractors who supply you with war materiel, to revise and modify existing arrangements so as to meet the countless dislocations and uncertainties caused by

changes in weapons, in strategy, in the economy, in the availability of commodities, and other variables. The extreme scope of the power given by Title II to "modify" and "amend" was explicitly recognized in the debate in the Senate. (See Cong. Rec. v. 87, p. 9839) Title II must be given an interpretation which will carry out the obvious intention of its framers.

In particular, the language of the act respecting "amendments or modification of contracts * * * * without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts," would be largely meaningless if it did not include the power to settle claims and release obligations in favor or against the United States arising either in connection with the original contract or as a result of a modification or amendment thereof.

The broad grounding of the opinion of the Attorney General, in which he gives effect to the "extreme scope of the power given by Title II to 'modify' or 'amend' " and holds that the War Department may adjust contracts to new conditions and circumstances; may modify or amend contracts "for any other purpose for facilitating the prosecution of the war," and may release obligations in favor of or against the United States, must be taken as affirmative support for the validity of unilateral action of the Government in respect to war contracts and, specifically, in so far as the pres-

ent case is concerned, unilateral action with regard to their termination.[21]

4. The administrative practice does not, as respondent suggests (Br. in Opp., p. 17), refute the existence of the power to terminate contracts where the contractor is unwilling to countenance cancellation. So far as the service agencies were concerned, there were few, if any, occasions warranting the invocation of such power and hence the question whether a contract could unilaterally be terminated without subjecting the Government to liability for anticipated profits was not of substantial practical importance. As we have already stated, the War Department had, since September 1941, required the inclusion of a termination provision in its contracts, and the Navy Department early in the war similarly included such a provision. *Supra*, pp. 36–38. Thus, in comparison to the total volume of contracts, the

[21] Respondent's reliance on the Attorney General's opinion (Br. in Opp., pp. 17–18), is, we suggest, misplaced for, although, as respondent points out, the Attorney General did hold that Title II encompassed bilateral action in terminating contracts, he does not hold that bilateral action was a prerequisite for the termination of a contract.

To further buttress its position that bilateral action is required under Title II, respondent refers to a memorandum submitted by the Attorney General to the Subcommittee of the Senate Committee on Military Affairs on S. 1268, S. 1280 and S. J. Res. 80 (See Hearings before that subcommittee, 78th Cong., 1st sess., p. 529) (Br. in Opp., pp. 19–20). That memorandum was in response to a request by the Chairman of the Subcommittee for an analysis of the common-law rights of a contractor whose contract had been terminated (Hear-

contracts without termination provisions were relatively few in number, and many of these contracts were subsequently amended to include termination provisions. Moreover, even when contracts without termination provisions were terminated, contractors usually were willing to negotiate a settlement, the settlement negotiations frequently being conducted against the background of the award of other contracts. The instant case is the only one of which we are aware in which the contractor seeks to recover the full anticipated unearned profits on a terminated contract. In these circumstances, it is difficult to say that the service departments developed an administrative practice contrary to our position here.

The official regulations and directives of the War and Navy Departments, as we show, *infra*, pp. 53–57, may reasonably be read to support the construction of Title II we have urged. At the very least, these documents are not, as respondent contends (Br. in Opp., pp. 17–23), opposed to our position. While these documents are concerned primarily with bilateral terminations and uphold their propriety, they do not purport to outlaw unilateral terminations. The vulnerability of re-

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ings, pp. 521–522), and the Attorney General's memorandum, as the title to that portion of the memorandum indicates, was limited to an analysis of such common law rights. Neither the request nor the answering memorandum dealt with the question of unilateral termination under the First War Powers Act.

spondent's position is that it attempts to read into these various documents, construing Title II as permitting bilateral termination, holdings that bilateral action is the exclusive means of effectuating the termination of a contract. In any case, these directives and regulations are not entitled to the usual weight accorded such pronouncements of policy in so far as they formulate a position as to unilateral termination, since there have been few, if any occasions to put these policies into practice.

The Judge Advocate General of the Army, following the Attorney General's opinion, has held that Title II authorized the termination of war contracts not containing a termination article. Opinion of the Judge Advocate General of the Army, SPJGC 164, September 16, 1942, digested in 1 Bull. JAG No. 5, pp. 304–305. In the digest of that opinion, which respondent quotes (Br. in Opp., p. 18) and from which it infers that bilateral action is a prerequisite to the termination of a contract not containing a termination provision, the Judge Advocate holds that, under Title II, contracts without a termination clause may be terminated by negotiated supplemental agreements. As appears from the opinion itself, the specific question raised was whether such termination could be settled by a supplemental agreement, and all that the Judge Advocate held was that such agreements are authorized by Title II. The rationale of this opinion would extend to the

situation where no supplemental agreement was negotiated subsequent to the unilateral termination, for the Judge Advocate holds, referring to an earlier opinion (SPJGC 160, July 3, 1942):

> The First War Powers Act, 1941, has for its purpose the winning of the war. It is not a statute motivated by social, economic or political ideologies, but a statute to prosecute a relentless, all-out war of self preservation. The intent of Congress to give the President every power he would require to procure war supplies and matériel, without the burdensome restrictions of peacetime procurement to hamper him, is clearly and simply indicated in the language of the act * * *."

Such an approach clearly contemplates, we suggest, that Title II embraces unilateral termination of a contract to facilitate procurement of

[22] Respondent's statement that the Judge Advocate's opinion quotes from an opinion of the Comptroller General to the effect that a termination settlement would be honored only where the original contracts were so amended by agreement (Br. in Opp., pp. 18–19), misreads that quotation. In the opinion cited (5 Comp. Gen. 450, 455), the Comptroller General held that the contracting officers of the administrative agencies did not have final authority to adjust and settle claims arising under contracts. And, as the Judge Advocate points out, that decision antedated the First War Powers Act. It is interesting to note that upon the enactment of the First War Powers Act, the Comptroller General clearly stated that the war agencies had the authority to terminate contracts, but contended that the settlement agreements should be subject to his pre-audit. See, *e. g.*, Hearings before House Committee on Naval Affairs, on H. R. 4469, 78th Cong., 2d sess., p. 1657; Hearings before House Committee on Military

war materials whether or not a supplemental agreement is negotiated.

This interpretation of the Judge Advocate General's opinion accords with the approach advanced in the War Department Text, *Government Contracts and Readjustment* (J. A. G. S. Text No. 12) (issued on May 1, 1945 for use as a training manual for J. A. G. officers), pp. 178–179 and fn. 50; 159–160, fn. 1. It is there stated (pp. 178–179):

> A fixed price supply contract which contains no termination article may nevertheless be terminated for the convenience or at the option of the Government. An agreement may be made with the contractor for termination and settlement of the contract in terms consistent with the best interests of the Government. If no such agreement can be concluded, the contract may be terminated and a unilateral determination made of the amount due. * * *

And in footnote 50 (at pp. 178–179), it is commented:

> Under principles applied by the courts in the construction of war statutes similar to the Contract Settlement Act, it would appear that war contracts entered into after adoption of the Act contain an implied condition that such contracts may be

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Affairs, on H. R. 3022, 78th Cong., 1st sess., p. 201. To make it clear that such pre-audit was not to be required was one of the objectives of the Contract Settlement Act. See *infra*, p. 56, fn. 23.

> terminated upon payment of fair compensation as defined in the Act. * * * This principle would seem to eliminate recovery of anticipated profits on work not done even where such a contract does not contain a termination article.

This text, being published after the enactment of the Contract Settlement Act, naturally confined its instructions to prospective JAG officers to the operation of that Act. But that statute was not enacted, as respondent suggests (Br. in Opp., pp. 22–23) for the purpose of authorizing the Government to terminate contracts unilaterally (see Sen. Rep. No. 836, 78th Cong., 2d sess., pp. 1–2; Hearings before Subcommittee of the House Committee on the Judiciary on H. R. 4789 and S. 1718, 78th Cong., 2d sess., pp. 34–35).[23] It does not enlarge the authority of the service departments *vis-à-vis* the contractors in that respect, but rather deals with the procedure to be followed once a contract is terminated. Hence to the same extent that under the Contract Settlement Act the Government had the power unilaterally to terminate contracts, as respondent concedes (Br. in Opp., pp. 22–23), such unilateral termination would

[23] The primary objectives of the Contract Settlement Act, as stated in Section 1 of the Act, were to secure uniformity in termination procedure, to provide a speedy method of settling termination claims, to facilitate reconversion to peacetime production, and to make it clear that the Comptroller General was not to pre-audit termination settlements.

appear to be similarly authorized under Title II of the First War Powers Act.[24]

Of the Navy Procurement Directives referred to by respondent (Br. in Opp., p. 19), those of July 7, 1943, and of December 15, 1944, although they deal with contract amendment and modifications under Title II, do not relate to the termination of contracts as such whether by unilateral or bilateral action. See Navy Procurement Directives, Part IV, par. 11,441 *et seq.* The remaining directive, that of September 16, 1942 (*id.*, par. 11,401, *et seq.*), does deal with contract termination and includes the comment:

> All contentions or proposals of contractors or of the Navy Department which cannot be disposed of in accordance with the express or implied provisions of a Navy contract * * * must be disposed of, if at all, through the exercise of powers (which are ample) conferred under the First War

[24] In regard to the War Department's interpretation of Title II, respondent also refers (Br. in Opp., p. 22) to Mr. Malman's article (*supra*, p. 38) in which he paraphrases Procurement Regulation 15, and from which he concludes that where a contract does not contain a termination article, and no satisfactory termination agreement can be reached with the contractor, an order to discontinue further performance is recognized by the War Department as a breach of contract. A careful reading of the relevant provisions of that regulation (see Hearings before the House Committee on Military Affairs on H. R. 3022, 78th Cong., 1st sess., p. 535) indicates that Mr. Malman's conclusion is of doubtful validity.

Powers Act and Executive Order No. 9001. [Par. 11,401]

This language, we believe, supports our view, rather than respondent's, as to the scope of the powers granted by the First War Powers Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

THE UNITED STATES, PETITIONER

v.

PENN FOUNDRY AND MANUFACTURING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This supplemental memorandum is submitted in accordance with the request made by the Chief Justice and Mr. Justice Black, at the oral argument of the case.

1. *The issues presented:* The issues raised by the Government in this Court concern the measure and amount of damages properly allowable to respondent on account of the Government's cancellation, on February 24, 1942, of its Notice of Award, issued on February 23, 1942. As formulated in the

Government's petition (p. 2) and brief (p. 2), the questions presented are:

> 1. Whether, in derogation of the legislative and executive policy governing termination of war contracts during World Wars I and II, the Court of Claims may properly award a contractor substantial anticipated but unearned profits, where his contract was cancelled on the same day that the notice of award was received, and before any work had been done, commitments made, or expenditures incurred.
>
> 2. Whether the Court of Claims' ultimate "finding" that respondent would have successfully completed the contract at a substantial profit can support its judgment where the findings of the evidentiary or primary facts are directly to the contrary.

In answer to these questions, we have urged that, on the basis of the Court of Claims' own findings, respondent was not entitled to anticipated profits of $80,000 as damages, since the court's evidentiary findings concerning the company's ability to perform and its prospects of making a profit do not support the ultimate determination of liability. (Brief for the United States, Point I, pp. 18-35). We have also argued that, in any event, the Government had the right to terminate respondent's war contract without liability for unearned anticipated profits, because (a) respondent's formal and definitive contract, which was expressly contemplated in the Notice of Award, would probably

have contained a clause authorizing such termination, and (b) the First War Powers Act, independently of contractual provision, authorized such termination. (Brief for the United States, Point II, pp. 33-58).

In connection with this second point, the preliminary nature of the Notice of Award was stressed on oral argument, and the suggestion was advanced, in further elaboration of the discussion contained in the brief, that a Notice of Award was a contractual instrument of such a character that unearned anticipated profits should not be allowed for its cancellation or breach. The Government raises no question with regard to the Court of Claims' finding that the Navy's Notice of Award was validly issued, and created a binding agreement between the United States and respondent. That finding was accepted in the Government's petition (p. 12, fn. 3) and in its brief (p. 18), and is not challenged now. However, we have always disputed the lower court's award of $80,000 for anticipated profits for the cancellation of the Notice of Award, and on the issue of damages we emphasize the nature of that agreement as directly bearing on the type and amount of the damages to be recovered. This memorandum is mainly devoted to a consideration of that point.

2. *Nature of the Notice of Award and liability for its cancellation:* As was pointed out in our main brief, the agreement involved here was cre-

ated by the Navy's sending respondent a short Notice of Award on February 23, 1942 (R. 20). That Notice, after stating that respondent's proposal was accepted, went on: "This acceptance is your authority to commence performance in accordance with the terms of your proposal without waiting for the formal contract, * * *" (R. 14). This language of the Notice of Award, taken together with the further language "Pending receipt of the contract * * *" (R. 14), demonstrates plainly that the Notice of Award was only a contractual instrument preliminary to the formal written contract, which would set out in detail the rights and liabilities of the parties. It is the Government's position that anticipated unearned profits may not properly be awarded for the termination of such a preliminary contractual instrument.

(a) During World War II, the service departments were confronted with the urgent problem of getting production started with the least possible delay. It was imperative that production not be held up pending the negotiation and execution of definitive contracts. Contractors, however, were reluctant to undertake production without a binding assurance by the Government that they would be reimbursed for the costs incurred, if no definitive contract were ultimately executed. In order to give contractors the required assurance and thus not to hold up production until a definitive contract were negotiated, the service departments developed vari-

ous preliminary contractual instruments—to be superseded by a definitive agreement as soon as possible—to bridge the period between the commencing of production and the negotiation of the definitive contract. Several such instruments, varying in the definitiveness of terms in accordance with the stage of negotiations, were developed. Among these instruments was the Notice of Award, which, although it most nearly approximated a definitive contract, still did not contain more than a skeleton of a final contract; and was intended, as in the present case, to be superseded by such a contract. See Fain and Watt, *War Procurement—A New Pattern for Contracts*, 44 Col. L. Rev. 127, 130-135.

In view of their limited purpose of assuring the contractor of reimbursement for costs incurred pending negotiation and execution of a definitive contract, practically all preliminary contractual instruments expressly excluded any allowance for unearned profits in the event of termination. Most of these instruments went further and even prohibited the allowance of profits on work actually done. Malman, *Policies and Procedures for the Termination of War Contracts*, 10 Law and Contemp. Prob. 449, 493-494. Thus, the letter of intent, a common preliminary contractual instrument, in its usual form, as here used, authorized the respondent immediately to purchase materials and to proceed with production; but under this letter of in-

tent, the sole items recoverable were the costs incurred in connection therewith if no order was placed by April 1, 1942 (R. 12).[1] Under the letter purchase order, another preliminary contractual instrument which placed an order for a specified item, the contractor was normally entitled to reimbursement only "for the costs incurred in the performance of this order." The letter contract, which specified a definite quantity at a definite price, entitled the contractor, in the event of termination to payment of "a sum equal to reimbursement for all costs incurred."[2] Since they were used for the same purpose as the other preliminary contractual instruments, Notices of Award, such as that issued in this case, should likewise be read to contain, by necessary implication, a provision barring recovery of profits on work not done, and limiting the contractor to his costs and profits on the work performed for the government.

(b) Moreover, at the time of the issuance and cancellation of the Notice of Award in this case, the final agreement as to the provisions of the definitive contract remained to be negotiated. Under the con-

[1] In this case, however, authority even to incur expenses under the letter of intent was withdrawn by the Navy's letter of January 7, 1942 (R. 18).

[2] Although there is an inconsistency between the express provisions limiting reimbursement to actual costs incurred and the termination provisions incorporated by reference in the letter contract, the contractor apparently received only actual costs in the event of termination. See Mahnan, *supra* at 493. But even under the termination provision, the contractor was not entitled to profit on work not performed.

sistent Navy and War Department practice, such a definitive agreement, containing many clauses and provisions, would have been entered into at some later date. It is impossible now to ascertain what the provisions of that definitive contract would have been, since they were to be determined by negotiation, and no such negotiation in fact took place. Especially at that time (Spring, 1942), the contract provisions used by the war procuring agencies were in a state of flux, and constantly varied to meet newly-discovered problems or to cure working defects in existing forms. Respondent's final contract might thus have contained all sorts of provisions, some of which it might have found it difficult to comply with and, at the same time, make a profit on the contract. For instance, if the formal agreement had included a usual type of Delays-Damages clause, imposing penalties for each day of delay, this respondent might well have found itself faced with a staggering loss (cf. Brief for the United States, pp. 20-26). And the record does definitely indicate one Navy requirement—a performance bond, which the Navy had decided to require in this case—which respondent probably could not have met. There is grave doubt whether respondent could have obtained the additional substantial working capital necessary to secure this required performance bond (cf. Brief for the United States, p. 5, 23-4, 29-30). In short, the nebulous state of the final contract, and the ac-

companying uncertainty whether respondent could have performed all the provisions finally agreed upon, make respondent's claim for anticipated profits speculative, hypothetical, and outside the realm of reasonable certainty, falling far short of the clear and direct proof required to sustain such an award.

Also, it should not be forgotten that, as compared to the usual case of awarding anticipated profits for breach of contract, the wartime conditions at the time respondent would have been required to perform its contract make the possibility that the company would have earned a net profit even more speculative and uncertain. During that period, material and labor were becoming scarce; men were being withdrawn from the labor market by the armed forces; production was increasing by leaps and bounds; companies, such as respondent, were entering into new fields of manufacture, which they had never undertaken before, and on a scale which had never before been attempted. It was a period of extreme fluidity of conditions, costs and profits, and one in which it was difficult, if not impossible, to forecast whether any given contract would be performed at a profit, and the particular provisions of the particular contract might be decisive. Cf. Hearings before Subcommittee of the Senate Committee on Appropriations on H. R. 6868, 77th Cong., 2d sess., p. 24 (testimony of General Somervell, Commanding General, Services of Supply, War

Department, quoted in our main brief, p. 31). "The demands for war equipment and supplies were so great in volume, were for such new types of products, were subject to so many changes in specifications and were subject to such pressing demands for delivery that accurate advance estimates of costs were out of the question." *Lichter* v. *United States*, 334 U. S. 742, 767. This general uncertainty of the conditions of production, added to the indeterminate status of the final contract, deprives respondent's claim to unearned profits of all support.

In addition, it was foreseeable, late in February, 1942, that the President or Congress, in the exercise of the war powers, might take action which would reduce, if not eliminate, the profits which respondent might have earned on its contract. At the time of the award, legislation to reduce and control profits on war contracts was already under consideration, and the Renegotiation Act, dealing with that problem, was enacted shortly thereafter on April 28, 1942. Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, 56 Stat. 226, 245. Had respondent been permitted to perform, its profits, if any, would have been subject to renegotiation under that Act. *Lichter* v. *United States*, 334 U. S. 742, 788. All these circumstances cast further doubt on whether unearned anticipated profits should be allowed for cancellation or breach of a Notice of Award.

(c) These conclusions are buttressed by the fact that even definitive contracts entered into at that time usually contained a termination provision (cf. Brief for the United States, pp. 36-41). As pointed out in our main brief, all War Department contracts at that time were required to contain a termination provision prohibiting unearned profits in the event of termination, and the Navy Department similarly developed "standard termination clauses for fixed price contracts * * * late in 1941 * * * [which clauses] in general form and substance have been inserted in most contracts * * *." (Main brief, pp. 39-40; petition, p. 18, fn. 11). Since most Navy contracts contained such a clause, the Notice of Award should similarly be read, in light of these usual provisions, to contain such a termination clause barring unearned profits on work not done. The present situation is analogous to that in the field of insurance, where temporary insurance in the form of a binder (equivalent to the preliminary contractual instrument here involved) is issued for the convenience of all parties, to continue in effect until the execution of a formal policy. *Sherri* v. *National Surety Co.*, 243 N. Y. 266, 270. There, the rule is that, on a loss incurred prior to the issuance of the policy, the obligations of the parties are "according to the terms of the policy in ordinary use by the company." *Lipman* v. *Niagara Fire Ins. Co.*, 121 N. Y. 454; *Eames* v. *Home Ins. Co.*, 94 U. S. 621, 629;

Fisher v. *Underwriters at Lloyd's, London*, 115 F. 2d 641, 645 (C. A. 7); *Sherri* v. *National Surety Co.*, *supra*; *Eureka Insurance Co.* v. *Robinson*, 56 Pa. 256, 264; *Trichelle* v. *Sherman & Ellis, Inc.*, 259 Ill. App. 346, 353-354; 1 Williston, Contracts (Rev. Ed.), pp. 65-66. In the *Fisher* case, *supra*, while the previous policies between the parties had excluded the first two days of disability from the liability of the insurer to pay a specified rate per day during the insured's periods of disability, no policy had been issued for the disability involved in the suit, and nothing had been said in the preliminary negotiations in regard to this two-day provision. The court nevertheless held that provision to be an implied term of the insurance. "In a preliminary contract, it will be presumed that the parties contemplated such form of policy, containing such limitations and provisions as are usual in such cases, or have been used before between the parties." 115 F. 2d at 645. Similarly, here, since a termination provision was usual (*i. e.*, used in most contracts entered into by the Navy), the preliminary contractual instrument should be read to contain such a provision.

We do not argue that the final contract in this case would surely have contained a termination clause. But we do urge that the probability of there being such a provision in the definitive agreement necessarily adds a further significant speculative factor to respondent's claim, and means that

respondent cannot, and has not, sustained its burden of showing its loss of profits by the required "clear and direct proof."

(d) Finally, we believe that the Notice of Award should be read in light of the well established policy, administrative and legislative, in World War II against allowing unearned profits on war contracts, even formal, definitive ones. The policy against war profiteering which was developed in World War II went beyond that of the first World War. In World War I, this policy was directed only against unearned profits on terminated contracts. In World War II, the Government's policy not only forbade unearned profits on terminated contracts, as reflected in the termination clauses used by the war procurement agencies and in the Contract Settlement Act (cf. Brief, pp. 37-38, 45-46), but also prohibited unreasonable profits on work actually done, as shown by the Renegotiation Acts.[3] This policy against war profiteering, we submit, should be given effect in considering whether respondent may recover $80,000 as unearned anticipated profits

[3] The factors to be considered in determining excessive profits, as set out in Section 403(a)(4)(A) of the Renegotiation Act of April 28, 1942, as amended, clearly are phrased in terms of allowing profits only in connection with work actually done. For example, subparagraph (i) deals with "efficiency of contractor, with particular regard to attainment of quantity and quality production, reduction of costs and economy in the use of materials, facilities, and manpower"; subparagraph (ii) sets out, as a factor, "reasonableness of costs and profits"; subparagraph (iv) deals with "extent of risk assumed" and subparagraph (v) with "nature and extent of contribution to the war effort." See 334 U. S. at 799.

on a preliminary war contract which was created and terminated practically simultaneously, and on which no work had been done, no expenses incurred, and no commitments made.

3. *Statutory authority for the contract:* During the period here involved, there was in effect Section 2(a) of the National Defense Act of June 28, 1940, 54 Stat. 676, 50 U. S. C. App. 1152(a), which authorized the Secretary of Navy, during the national emergency, "to negotiate contracts for the acquisition, construction, repair or alteration of complete naval vessels or aircraft, or any portion thereof, including plans, spare parts, and equipment therefor * * * and also for machine tools and other similar equipment, with or without advertising or competitive bidding upon determination that the price is fair and reasonable. * * *".

Also in effect, at the time of the award, was Title II of the First War Powers Act (Act of December 18, 1941, 55 Stat. 839) providing:

> The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, per-

formance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war: *Provided*, That nothing herein shall be construed to authorize the use of the cost-plus-a-percentage-of-cost system of contracting: *Provided further*, That nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits: *Provided further*, That all acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest.

The President delegated this authority to the Navy Department by Executive Order No. 9001 (dated December 27, 1941, 6 Fed. Reg. 6787, 3 CFR 1941 Supp.; pp. 330-332), which permitted the making of contracts without regard to the then-existing statutory provisions governing Navy Department procurement, with certain exceptions.[4] The Notice of Award in this case (dated February 23, 1942) was presumably issued under the authority of the First War Powers Act and Executive Order No.

[4] The Executive Order required that all contracts made under its authority contain (a) an anti-discrimination clause, (b) a warranty against employment of contingent-fee brokers, and (c) the appropriate clauses where required by the Walsh-Healey, Davis-Bacon, Copeland, or Eight-Hour laws. Cost-plus-a-percentage-of-cost contracts were forbidden, and compliance was directed with the requirements of existing law relating to limitation of profits. At that time (February 1942), there were no profit-limitation provisions applicable to respondent's contract.

9001. (On the First War Powers Act, see our main brief, pp. 42-3, 47-51, and cf. Fain and Watt, *War Procurement—A New Pattern in Contracts* (1944) 44 Col. L. Rev. 194).

Respectfully submitted,

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JANUARY, 1949.

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BRIEF FOR RESPONDENT IN OPPOSITION

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SUPREME COURT, U. S.

No. 253.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

THE UNITED STATES, *Petitioner*

v.

PENN FOUNDRY AND MANUFACTURING COMPANY, INC.

On Petition for Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENT IN OPPOSITION.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Claims has not yet been reported. Its special findings of fact, conclusion of law, opinion, and judgment are set out in the Record at pp. 16-22, 22, 22-26, 26, respectively.

JURISDICTION.

The judgment of the Court of Claims was entered February 2, 1948 (R. 26). A motion for a new trial was denied June 1, 1948 (R. 27). The petition for a writ of certiorari

was filed August 31, 1948. The jurisdiction of this Court is invoked under the provisions of Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939 (28 USC § 288, New Judicial Code, 28 U.S.C. § 1255 (1)).

QUESTIONS PRESENTED.

1. Whether the Court of Claims' special findings of fact that petitioner and respondent had entered into a binding contract, that petitioner unilaterally and without right breached that contract, and that respondent was damaged in the sum of $80,000 are conclusive and not reviewable upon petition for a writ of certiorari.

2. Whether anticipated profits can be recovered as damages in an action for breach of contract.

3. Whether in the absence of any express contractual reservation, the Government had the right, by reason of any administrative practice or statute, unilaterally to cancel its contract with respondent and whether, in any event, this question is open on the present record.

STATEMENT.

On June 21, 1944, respondent filed a petition in the Court of Claims to recover its damages arising out of petitioner's unauthorized breach of contract for delivery of certain naval gun mounts (R. 1-4). After full hearings and argument, the Court of Claims entered judgment for the respondent in the sum of $80,000 (R. 26) predicated upon its exhaustive special findings of fact (R. 16-22), conclusion of law (R. 22) and its supporting opinion (R. 22-26). Petitioner's motion for a new trial was denied by order of June 1, 1948 (R. 27).

The facts upon which respondent's claim was predicated and the judgment below was founded are fully detailed in the Court of Claims' special findings of fact. Briefly, those findings show that respondent, a Virginia manufacturing

corporation (R. 16), with an extensive plant and facilities at Waynesboro, Virginia (R. 17), entered into negotiations with the Navy Department, early in 1941, regarding its production of gun mounts (R. 17). Respondent submitted its proposal and also gave the Navy a list of equipment it owned or deemed available for the proposed production (R. 17). Respondent's proposal showed that it contemplated subcontracting for the necessary castings and certain other component parts to be incorporated in the gun mounts (R. 10, 17, 19). It was also shown that respondent had carefully surveyed and planned for its labor supply (R. 19). Additionally, respondent had made considerable expenditures and incurred obligations in 1940 and 1941 to improve its plant, to prepare and furnish the data requested by the Navy incident to negotiations for a production contract, to prepare machine tool analyses and to obtain necessary managerial and engineering personnel (R. 16, 17, 20, 21, 26).[1]

After a naval representative had inspected respondent's plant and conferred with its manager who was an engineer highly thought of by the government for his experience and ability (R. 17, 25), respondent was requested to and did furnish additional information as to its financial ability, commitments of sub-contractors, and machine tool operations, upon the basis of which respondent slightly modified its previous proposals (R. 17). Thereafter at a conference on December 22, 1941, respondent's proposal as to prices, quantities, delivery schedules, payments and options for additional production of mounts was accepted as satisfactory (R. 17).

Finally, on December 29, 1941, the Navy issued a "letter of intent", to respondent confirming its previous advice that an order for gun mounts would be placed with it, which

[1] The award made by the Court of Claims excluded and does not compensate respondent for losses on account of such expenditures or for loss suffered by reason of its inability to produce other items after its tools and machinery were requisitioned by the government in 1942 (R. 21-22).

was accepted by respondent on January 10, 1942 (R. 17-18; Resp. Ex. No. 3, R. 12-13).[2] On February 23, 1942 the Navy mailed a "Notice of Award" of contract No. LL96553 in the amount of $2,087,355 which respondent received the next day (R. 20; Resp. Ex. No. 4; R. 13-14).[3] Shortly after the notice of award was issued, petitioner cancelled the contract (R. 20).

The Court of Claims found that "if the [respondent] had been permitted to perform its contract, it would have made a net profit of not less than $80,000" (R. 21), and the court entered judgment accordingly (R. 26).

ARGUMENT.

Introduction.

Although petitioner denied the existence of a contract in the trial below, it now concedes that the notice of award effected a binding contract (see fn. 3 *supra*), but contends:

1. That respondent was not entitled to an award of damages because

   (a) its alleged loss of profits was speculative in that it could not have performed the contract, and

   (b) in any event the alleged loss of profits was not recoverable in damages upon the Government's breach of contract.

2. That, both under Title II of the First War Powers Act as implemented by Executive Order No. 9001 and administrative war procurement policy, the Government "may well have" been authorized to cancel or terminate respondent's contract, even though it did not contain any termination clause.

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[2] The letter of intent did not ask for or mention a performance bond, and no question is involved here as to such a bond.

[3] Petitioner states that "For the purposes of this petition, we shall assume that the notice of award, dated February 23, 1942, consummated a binding contract" (Pet. 12, fr. 3).

While respondent will show that these contentions are without merit, it is appropriate to note that the primary contention—that relative to compensable damages—seeks nothing more than a reconsideration of the evidence upon which the judgment below was predicated, and this, it will be shown, is foreclosed by the definitive and conclusive special findings of the Court of Claims. This contention does not raise questions of such character or importance as to justify the exercise of the power of certiorari. Rules 38 (5) and 41, Revised Rules of the Supreme Court. Certiorari will not be granted merely to review evidence or inferences drawn from it. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175; *United States* v. *Johnston*, 268 U. S. 220. Thus, in comparable circumstances, this Court has denied certiorari to bring up a patent case involving no conflict of authority but merely the usual questions of fact inherent in such litigation. *Keller* v. *Adams-Campbell Co.*, 264 U. S. 314.

Petitioner's contention with respect to its right to cancel similarly furnishes no basis for certiorari. That defense was not raised below in the pleadings, the hearings or by brief or argument, and it was first injected into the case upon motion for a new trial. There is nothing in the record upon which this contention can be founded or posed here, and, in any event, as will be shown hereinafter, it is utterly without merit and is not supported by any authority. Accordingly, certiorari here would appear proscribed by the principles enunciated by this Court that certiorari is "* * * to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision". *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 258.

I.

The Court of Claims' Finding That Respondent Would Have Made a Net Profit of Not Less Than $80,000 If It Had Been Permitted to Perform Its Contract is Conclusive, Consistent With Other Findings and Not Reviewable.

A. The finding as to damages is amply supported in the record.

Petitioner's contention that the anticipated profits of $80,000 awarded in damages were purely speculative (Pet. 12-17), must fail because that contention is predicated upon an evaluation of evidence which does not appear in the record here. As a matter of fact, petitioner omits to state that respondent adduced considerable evidence at the trial below—such as complete cost accounting data and engineering manufacturing estimates upon which the contract was negotiated—showing that it would have made a net profit of from 8% to 10% of the contract price.

It is evident from the record before this Court that the special finding below, that respondent would have made a net profit of not less than $80,000 if it had been permitted to perform, was not speculative but that it was derived from substantial evidence adduced by respondent and evaluated by the Court of Claims as the finder of fact. Thus, the court considered evidence showing that respondent had fully and carefully planned for production under the contract (R. 17, 19, 22-23, 25), that it had made various necessary sub-contracting arrangements (R. 19), that it had surveyed and planned its labor requirements and supply (R. 19), that its plant facilities were accepted as satisfactory by the Navy (R. 17), that it had secured expert engineering services for management to be compensated for by a percentage of profit (R. 17, 25), that the respondent was willing to finance performance without advance funds from the Navy (R. 25) and that after various conferences between officials of respondent and the Navy and upon the submis-

sion by respondent to the Navy of detailed supporting data as to its plans, equipment and proposals, they were accepted as satisfactory and the contract awarded (R. 17, 23-24). Even if the Court of Claims had not marshalled these various evidentiary findings, as it did, it must be assumed that such evidentiary findings were considered and evaluated in arriving at the ultimate finding of fact that respondent would have made a profit. *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 321.

Petitioner makes much ado (Pet. 15-16) about the fact that several of the items of proof which were marshalled in support of the Court of Claims' judgment were set forth in its opinion rather than in its findings of fact. Petitioner notes that the opinion rather than the findings of fact referred to factors such as that respondent's production manager, who was highly thought of by the Government for his experience and ability, was willing to work for the respondent on a percentage of profits basis (R. 25), that the stockholders of respondent were willing to finance performance without any advance funds from the Government (R. 25), and that the Government might be expected to show some tolerance to war contractors doing their best to perform (R. 25, 26), all of which were mentioned by the court below as reflecting on the probability that the contract could be performed at a profit.

All of these factors noted in the Court of Claims' opinion are fully supported by the evidence adduced below—which, of course, is not part of the record here—and the Court no doubt would have made them part of its findings of fact if they were necessary to support its judgment. However, they were only mentioned by the court as facts and circumstances, supplemental to the primary evidentiary findings which have already been summarized and which were set forth in its findings, furnishing additional explanatory support for the judgment. Consequently their omission from the findings of fact is of no consequence, for they served merely as additional explanation of the reasons for the actual findings made. See *United States* v. *Wells*, 283 U. S.

102, 120-121.[4] There are additional observations in the opinion of the same explanatory nature which are not subject to objection on the score that they should have been included physically in the special findings of fact. Such additional observations include, *inter alia*, those to the effect that in any case where a long term production contract is breached at the outset there may be uncertainties as to what the future might bring (R. 25), that the difficulties which respondent had to overcome were not unique or unanticipated in the vast conversion from peacetime to wartime production (R. 19), and that the belief of both the Navy and the respondent that respondent could perform the contract at a profit was implicit in the Navy's acceptance of respondent's proposal which included an option by the Navy to require respondent to produce additional mounts (R. 17).

B. The special finding on loss of profits is consistent with the other findings.

Petitioner argues that the finding of fact that respondent would have made a net profit of at least $80,000 is inconsistent with other findings reflecting on respondent's capacity to have produced the gun mounts in accordance with the contract and at a profit (Pet. 12-13). Petitioner also contends that the Court of Claims should have made a negative finding that respondent "had not proved that it

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[4] "It is evident that the court did not consider the statements in its opinion, which we have quoted, as additional findings of fact, but as an argument with respect to the conclusion to be drawn from its findings. In its opinion the court was summarizing what it considered to be the effect of its findings, and no useful purpose would be served in returning the case for a specific finding that the motive which impelled the decedent to make the transfers [121] was precisely that which the court has thus definitely stated. While, in accordance with proper practice and the rule of this court, the Court of Claims should have found the ultimate fact, and we do not approve the method it adopted, we are of the opinion that in view of the findings of fact actually made and the conclusion they import, the judgment should be sustained." 283 U. S. at 121.

could have successfully performed the contract and made a profit thereon" (Pet. 10). For reasons already discussed hereinabove, there is no inconsistency in the findings below. The Court of Claims as the finder of fact merely mentioned the difficulties which respondent might have encountered in producing under the contract as one item which had to be taken into consideration with all of the other evidence showing that it would have been performed at a profit. Obviously, the Court of Claims concluded that the evidence concerning the problem of performance was overcome by the greater probative value of that proving respondent's ability to perform at a profit.

In any event, the references to respondent's potential difficulties in performance do not have the significance which petitioner attributes to them, for the Court of Claims found (R. 17) that after full conferences with respect to respondent's proposals, including full and complete information concerning its plant, production capacity and delivery schedules, the Navy accepted those proposals as satisfactory. Thus, in assessing the probative value of the evidence as to respondent's difficulties in producing, the Court of Claims necessarily considered the fact that even though all of these difficulties were known to the Navy Department beforehand, respondent's plant and proposals were accepted as satisfactory and the contract was awarded. Moreover, contrary to petitioner's implication, the Court of Claims did not entirely reject the evidence showing that respondent might have difficulty in producing under the contract, but it took that evidence into consideration in scaling the respondent's anticipated profit down from the claimed figure of 8% to 10% to approximately 4%, resulting in the final award of only $80,000.

For the foregoing reasons, there is no merit in petitioner's contention that the Court of Claims should have made a negative finding that respondent would not have been able to successfully perform under the contract. Petitioner is, in effect, challenging the weight of the evidence to support

this special finding and is suggesting that an opposite conclusion should have been reached by the trier of the facts in the process of weighing the evidence. The finding that respondent would have made not less than $80,000 taken together with the other findings of fact, which are wholly consistent, necessarily excluded the possibility that respondent could not have performed under the contract at a profit. In such circumstances, a negative finding would have been erroneous and would not have been required by reason of positive findings covering the same subject. See *Oregon-Washington R. & N. Co.* v. *United States*, 255 U. S. 339, 349.[5]

C. The Court of Claims' finding of fact as to damages is not reviewable on certiorari.

In any event, petitioner's attack upon the findings as to damages is proscribed by the established practice of this Court with respect to review of Court of Claims cases. This Court has repeatedly held that it cannot review Court of Claims' findings of fact and that such findings are conclusive. *United States* v. *Causby*, 328 U. S. 256; *Fred. T. Ley & Co.* v. *United States*, 273 U. S. 386; *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533; *Stilz* v. *United States*, 269 U. S. 144; *Saalfield* v. *United States*, 246 U. S. 610; *Wm. Cramp & Sons Ship and Engine Bldg. Co.* v. *United States*, 239 U. S. 221; *Mahan* v. *United States*, 14 Wall. 109. It is the duty

[5] "The government further urges that the proposed amendment to finding VI, is covered by findings VI [349] and IX., and is only a request 'to change a negative to a positive finding;' that the amendment to finding X is 'rather an argument that certain conclusions should follow from facts found,' and that 'its conclusion, from the facts found, is that both parties regarded the settlements as final, not as tentative.' The amendment to finding XI, is, the government says, 'a request to find evidence,' which is contrary to the rules; and, besides, the evidence is immaterial.

"We concur with the government that the request for findings is an effort to change negative to positive findings. The reasoning of the court expresses implicitly, if not explicitly, a view contrary to that expressed in the request. In other words, the court regarded the settlements of appellant with the government as final, and not as tentative." 255 U. S. at 349.

of the Court of Claims to deal with conflicting evidence or inferences to which evidence might give rise. *United States* v. *Esnault Pelterie*, 303 U. S. 26. It is not the function of this Court to examine the evidence to determine whether it supports a finding of the Court of Claims. *United States* v. *Causby*, *supra*, 328 U. S. at 268. The findings of the Court of Claims determine all matters of fact precisely as does the verdict of a jury, and this Court is not—so it has said—at liberty to refer to the opinion of the Court of Claims in order to eke out, control or modify the scope of the findings. *Crocker* v. *United States*, 240 U. S. 74. Consequently, since, in the instant case, the Court of Claims made an articulate and unambiguous finding of fact that respondent would have made a net profit of not less than $80,000 if it had been permitted to perform its contract, that fact must be taken as conclusively established.

II.

Anticipated Profits Can be Awarded as Damages in Consequence of an Unauthorized Breach of Contract by the Government.

While petitioner inferentially asserts the contrary, it is clear that the law of damages allows recovery of anticipated profits upon breach of contract. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 379; *United States* v. *Purcell Envelope Co.*, 249 U. S. 313; *Anvil Mining Co.* v. *Humble* 153 U. S. 540; *Cincinnati Siemens-Lungren Gas Co.* v. *Western Siemens-Lungren Co.*, 152 U. S. 200, 206; *Western Union Telegraph Co.* v. *Hall*, 124 U. S. 444, 454-455; *Hinckley* v. *Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 275; *Phila. W. & B. R. R. Co.* v. *Howard*, 13 How. 307, 344. See also memorandum of the Attorney General quoted *infra* at p. 20.

Respondent concedes that a claim for loss of profit must be proved and not be based on mere speculation. But, as we have already stated, respondent adduced considerable evidence below, such as detailed cost accounting data, upon

which its anticipated profits were predicated, and which apparently satisfied the Court of Claims. Thus the situation is materially different from that in *United States* v. *Behan*, 110 U. S. 338—upon which petitioner relies (Pet. 14)—for in that case the Court of Claims specifically stated and this Court noted that the claimant had adduced no proof whatsoever in support of its claim for loss of profits. The proof adduced below in support of the inclusion of profits in damages was essentially the same as that in *Anvil Mining Co.* v. *Humble*, *supra*, where the claimant proved and was allowed his probable future profit under a mining contract on a showing of the contract price as against the cost data for production.

Actually, petitioner confuses approximated future profits—which are allowable in damages—and purely speculative profits which, of course, cannot be awarded upon breach of contract. Thus, where the claimant fails to adduce any proof as to profits, an award including them would, as shown in the *Behan* case, be purely speculative. Similarly, where the profit item was not within the contemplation of the parties in entering into the contract, as for example where they are the fruits of independent and collateral engagements or contingent upon future bargains, they would be considered speculative. *Western Union Telegraph Co.* v. *Hall*, *supra*. Thus in *Howard* v. *Stillwell & Bierce Mfg. Co.*, 139 U. S. 199—upon which petitioner also relies (Pet. 14)—loss of profit from the claimant's anticipated productive use of machinery which the other party had contracted to repair was properly denied as damages because it was remote to the contract breached in that it was not within the contemplation of the parties in contracting. In cases such as the instant one, however, the parties obviously contemplated that profit would be made from production under the contract, and consequently the loss of profits was directly related to and not a remote consequence of the breach. 15 Am. Jur. § 151; *Haddad* v. *Western Contracting Co.*, 76 F. Supp. 987, 990 (N. D. W. Va., 1948). In the

sense that unless production were actually completed the precise profit could not be known, anticipated profits might be said to be speculative. This would appear to be the use to which petitioner puts the term speculative in this case. However, that usage would in effect bar recovery of all anticipated profits which, as already shown, are a proper item of damage. Actually, the better description of the anticipated or expected profits proved and allowed here is that they are approximated as indeed they must be since petitioner prevented performance. *Eastman Kodak Co.* v. *Southern Photo Materials, supra.* However, damages are not rendered uncertain because they cannot be calculated with absolute exactness; it is sufficient if a reasonable basis of computation is afforded, even though the result is approximate. *Eastman Kodak Co.* v. *Southern Photo Materials, supra.* See also *Gulf States Creosoting Co.* v. *Loving*, 120 F. 2d 195, 204 (C. C. A. 4, 1941). Such a basis of computation was furnished by respondent below in the cost accounting and engineering data submitted in evidence. And proof here was made more certain in determining respondent's costs because the cost of the steel castings and material parts to be furnished by sub-contractors was known. Certainly any possible margin of error or speculation in that evidence was removed by the determination of the finder of fact to scale down the asserted margin of profit so as to take account of potential production difficulties.

III.

Petitioner Had Neither Contractual Nor Statutory Right to Cancel the Contract With Respondent, and Since This Question is Outside of the Record, It is Not Before This Court.

A. On the present record, petitioner's contention as to the right to cancel is untimely.

After the Court of Claims had found that respondent would have made a net profit of at least $80,000 (R. 21), and

entered judgment accordingly (R. 26), petitioner, having previously failed to offer a valid reason for cancelling the contract, moved for a new trial (R. 27) on the ground *inter alia*, that the Government had a right to cancel the contract without being liable for damages for loss of profits even though the contract did not contain a cancellation clause. Neither the findings nor the opinion of the Court of Claims, which fully covered all of the defenses raised at the trial, reflected upon this contention because such a defense had not been offered at trial and no evidence had been offered to show whether or not any controlling governmental policy existed at the time the contract was awarded or cancelled which would have authorized termination without such liability. The Court of Claims properly denied the motion for new trial (R. 27) because the assertion therein that the contract was cancellable was untimely and was not directed to any error whether of law or fact since the issue had not been presented to or disposed of by the Court before judgment, and for the other reasons discussed in subsections B & C below.

What petitioner sought by its motion for a new trial and now seeks here violates all accepted judicial patterns, for it, in effect, asks a second opportunity—after full and fair resolution of all issues presented—to offer a theory or defense of which it failed to take advantage when opportunity and procedure required. See *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. 2d 544, 558 (App. D. C.), certiorari denied 305 U. S. 613. This second chance could not have been awarded under the rules of the Court of Claims and should not, we submit, be here given, for the review of the Court of Claims' judgment is confined to the record (Rule 41, Revised Rules of the Supreme Court) and that record does not show that petitioner's contention as to the right to cancel reflects error by the court below nor that the motion for a new trial first raising this defense "was one made upon evidence or otherwise in accordance with statute". *United States* v. *Seminole Nation*, 299 U. S. 417, 421.

B. When this contract was awarded and cancelled, cancellation was not justified by any established administrative policy.

Even assuming *arguendo* that petitioner can now urge its right to cancel, there is obviously no merit to its contention. Petitioner argues that the award of loss of profits was improper because a termination clause probably would have been inserted in the formal written contract between the parties in view of the established wartime procurement policy of including such clauses to permit the Government to terminate performance at any time (Pet. 17-20).

The Court of Claims found (Findings of Fact 3 and 4, R. 17-18; R. 23-24) and petitioner does not dispute (Pet. 12) that a binding contract was effected between the parties by respondent's acceptance of the Navy's letter of intent and by the issuance of a notice of award. Nothing contained in that contract expressly or impliedly authorized unilateral termination by the Government. Even if that contract could be modified by an alleged procurement policy of the buyer, the existence and effect of such a policy would be subject to timely proof. Yet, as we have noted, no proof was offered or adduced below upon which any such factual assertions as petitioner now advances could be founded.

In any event, the claims as to alleged government procurement policy have no force with respect to the instant contract. Even were it demonstrable that when this contract was negotiated and executed in late 1941 and early 1942, the War Department adhered to a policy of inserting termination clauses in procurement contracts, there is not one iota of evidence that the Navy Department, with whom this particular contract was made, definitively followed the same practice at that time. Not a single one of the references cited by petitioner in footnote 9 of the petition shows that the Navy, in contradistinction to the Army, had such a definite policy when this contract was awarded. And certainly references to statements of Navy officials made in 1943 and 1944 to the effect that termination clauses "developed late

in 1941" were inserted in "most contracts" (Pet. fn. 11, p. 18) is of no probative value to support the proposition that such a clause would have been inserted in this particular contract negotiated at the end of 1941. Actually, the first official Navy requirement that termination clauses should be inserted in procurement contracts was not issued until more than two years after the instant contract was executed. That requirement (Navy Contract Termination Directive No. 1 of February 28, 1944)[6] was issued after the establishment of the Joint Contract Termination Board on November 12, 1943 and the promulgation of the Joint Termination Regulation, effective January 8, 1944, both of which were the result of executive and legislative studies showing the need for uniformity in war contract and termination policies and procedures.[7] Accordingly, it is clear that petitioner and respondent did not agree to or contemplate that the Government would have the right unilaterally to cancel the contract. It is equally clear that there was no such articulation of *Navy* practice, when this contract was executed, as would justify any speculative inference upon which to read such a provision into the contract.

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[6] The directive (contained in *Navy Procurement Directives*) states in its first paragraph:

> "The Office of War Mobilization has prescribed a Uniform Termination Article for Fixed-Price Supply Contracts for use by Government procurement agencies and a Statement of Principles for Determination of Costs upon Termination of Government Fixed-Price Supply Contracts. The Secretary of the Navy hereby directs the insertion in all Navy fixed price contracts dated more than thirty days after the date hereof for the manufacture or sale to the Government in the continental United States of war supplies and equipment other than the contracts specified in paragraph 4 hereof, of the provisions set forth in Enclosure (A), which incorporates by reference Enclosure (B)".

[7] See U. S. Office of War Mobilization Report on War and Post-War Adjustment (1944), 90 Cong. Rec. No. 2, January 11, 1944. See also Hearings before Subcommittee of Senate Committee on Military Affairs on Problems of Contract Termination (considering S. 1268, S. 1280 and S. J. Res. 80, 78th Cong. 1st and 2nd. Sess., 1943-1944) which preceded enactment of Contract Settlement Act of 1944.

C. When this contract was awarded and cancelled, there was no statutory authority for unilateral termination.

Petitioner argues that the Navy "may well have been furnished" with the power to terminate this contract by virtue of a provision of the First War Powers Act, (Act of December 18, 1941, c. 593, Title II, Sec. 201, 55 Stat. 839; 50 U.S.C. App., Supp. V., 611) empowering the President to authorize any war agency to "enter into contracts and into amendments or modification of contracts whenever he deems such action would facilitate the prosecution of the war . . . ", as implemented by Executive Order No. 9001 (December 27, 1941, 6 Fed. Reg. 6787, 3 C. F. R., 1941 Supp., pp. 330-332).

This contention is an abuse of reason and the plain language of the statute, and it is rebutted by consistent administrative interpretation to the contrary. Its vice is that it distorts a legislative grant for negotiated agreement into pretended authority for unilateral cancellation. A review of administrative interpretation and practice under the First War Powers Act confirms this. After the enactment of the statute and the promulgation of Executive Order 9001, the Secretary of War submitted to the Attorney General for opinion a proposed subdelegating order which provided:

> "The powers hereby delegated may be exercised by (a) supplemental agreements which may modify or amend or settle claims by or against the United States arising under or with respect to any contracts heretofore or hereafter made; (b) *agreements with contractors or obligors* releasing accrued obligations of any sort * * * or (c) *supplemental agreements* and change orders suspending or modifying the operation of existing contracts * * *"[8] (Italics supplied).

[8] The Secretary's order is quoted in the text of 40 Ops. Atty. Gen., No. 53, August 29, 1942. That opinion, the proposed order and examples of action to be taken thereunder are all set out in full at pp. 360-368 of the Senate Hearings on Problems of Contract Termination *supra* fn. 7.

In his opinion as to the validity of the proposed order, the Attorney General confirmed the statutory requirement of bilateral action; stating (40 Ops. Atty. Gen. No. 53, August 29, 1942, at p. 9):

> "In passing the First War Powers Act, *the Congress desired to enable you* (Secty. of War), *and the contractors who supply you* with war material to revise and modify existing arrangements so as to meet the countless dislocations and uncertainties caused by (conditions and exigencies of war etc.") (Italics supplied.)

The same conclusion is evident from the opinion of the Judge Advocate General which states (1 Bull. J. A. G. No. 5, pp. 304-305, October 1942:

> "Under the First War Powers Act, 1941 (55 Stat. 838, 50 U. S. C. 611) and Executive Order No. 9001, issued pursuant thereto
>
> > '*The Secretary of the War*, may, where it has been administratively determined that it will facilitate the prosecution of the war, *terminate contracts* for the convenience of the government *by entering into supplemental agreements* providing for negotiated lump-sum settlement * * *' whether or not such contracts contain clauses authorizing termination by the Government and providing a method of settlement in the event the contract is so terminated."[9] (Italics supplied.)

The Judge Advocate's opinion also quoted a decision of the Comptroller General of the Navy to the effect that termina-

[9] The Army Ordnance Department implemented the opinions quoted in the text by advice to its contracting officers on October 9, 1942 that the "Secretary of War has made the administrative determination that *negotiated* settlements, upon termination for the convenience of the Government when *agreed to by the contractor* will facilitate the prosecution of the war effort and the amendment of existing contracts to provide for such settlements has been authorized under the provisions of the First War Powers Act and Executive Order No. 9011. Existing contracts may therefore *with the contractor's consent* be amended so as to include provisions set forth in paragraph 1". Goldman, *Termination of War Contracts*, 42 Mich. L. Rev. 733, 745. (Italics supplied.)

tion settlement would be honored only where the original contracts were so amended "by agreement". That the Navy Department also so construed the authority confirmed by the First War Powers Act is apparent from the terms of its directives of September 16, 1942, July 7, 1943 and December 15, 1944 on the subject. Part IV, Amendments And Modifications Of Contracts, *Navy Procurement Directives*, pp. 5711-5715.

The petitioner cannot, of course, gain comfort from the administrative and judicial application of World War I statutes, for vital and controlling differences in terminology make those statutes inapposite. The World War I statutes referred to specifically authorized the President to "modify, *suspend, cancel* * * *" (Emphasis supplied to Act of June 15, 1917, 40 Stat. 182) whereas the First War Powers Act of World War II merely gave the power to amend, *not* to cancel.

That petitioner's present argument as to its statutory right of unilateral cancellation is made of whole cloth is apparent from the Attorney General's contrary disposition of the problem in 1943. During the course of the Senate hearings on the problem of contract termination, Senator James E. Murray, Chairman of the Subcommittee, wrote the Attorney General, under date of November 29, 1943, as follows (Senate Hearings, *supra*, fn 7, pp. 521-522):

> "Seventh, many divergent views have been presented to members of the committee concerning the common-law rights of a contractor whose contract has been terminated, as distinguished from his rights under a termination clause. Would it be possible for you to analyze these common-law rights in detail for the benefit of the committee, comparing them point by point with the rights of a contractor under the standard clause now used by the War Department."

In response, the Attorney General submitted a memorandum stating (Senate Hearings, *supra*, fn 7, p. 529):

"7. COMMON-LAW RIGHTS OF A CONTRACTOR WHOSE CONTRACT HAS BEEN TERMINATED, COMPARED WITH A CONTRACTOR'S RIGHTS UNDER A TERMINATION CLAUSE.

"In general it may be said that the difference between the common-law rights of a contractor whose contract has been terminated and the rights given by the standard termination-clause now in use by the War Department is the difference between the right to recover damages for a breach of contract and the right to have the contract performed in accordance with its terms. * * *

"In the event of the termination of a contract that does not contain a termination clause, where the contractor does not agree to terminate and there is no exercise of the Government's power of eminent domain, and where the contractor is satisfactorily performing his part of the agreement at the time of termination, the Government's refusal to accept complete performance and to pay the agreed consideration in full would, in normal circumstances, constitute a breach of the contract for which the contractor would be entitled to recover damages. In such case, generally speaking, a court would attempt to give the contractor a judgment which would place him in the same financial position as if the contract had been fully performed. However, there are a number of conditions which the contractor would have to meet in order to be assured of complete relief. For example, he would have to demonstrate that he had taken reasonable steps to mitigate his damages; that particular items of loss were reasonably within the contemplation of the parties as probable consequences of a breach, and that they were occasioned by the breach; that anticipated profits claimed to have been lost would have been earned but for the breach, and that they were not too speculative and remote; etc.[10]

[10] Earlier during the aforementioned Senate hearings, Attorney General Biddle confirmed the necessity of bilateral action to avoid the consequences breach by stating (p. 343):

"Even in the absence [from the contracts] of the termination provisions which I have mentioned, I think it clear that the contracting agencies have the power to negotiate with their contractors for the termination of contracts * * *"

Thus at a point of time determinative of the rights and liabilities in this cause, the Attorney General unequivocally stated to the Congress, as a basis for legislative action, that absent a termination clause, the government was liable for breach of contract upon its unilateral cancellation, and that in such event anticipatory profits could be recovered. The same view was expressed and acted upon by the contracting services. Thus the War Department's text, *Government Contracts and Readjustment* (published for use as a training manual for J. A. G. officers) states, (at pp. 159-160, 178-179 (fn. 50)):

> "To permit such termination without liability for breach of contract, the War Department, since 16 September 1941, has included in its contracts a termination article giving the Government the right to terminate the contract for its convenience or its option."
>
> "The Government is liable for breach of contract where it prevents performance by the other party to a contract. See Ch. VIII, 'Performance and Breach by the Government'. Ordinarily cessation of the war or lack of use for the war material contracted for does not relieve the Government of liability under a duly authorized contract. It has, however, been held that the existence of a statute authorizing the President to terminate a war contract and pay reasonable compensation to the contractor will bar recovery of anticipated profits, on the theory that the statute was an implied condition of the contract. *Buffalo Union Furnace Co. v. United States Shipping Board Emergency Fleet Corp.* 291 Fed. 23 (C. C. A. 2d, 1923). See also *Russell Motor Car Co. v. United States*, 261 U. S. 514 (1923). This principle might be applied to war contracts not containing termination articles in view of the provisions of the Contract Settlement Act".
>
> • • •
>
> "JTR 214.2. Under principles applied by the courts in the construction of war statutes similar to the Contract Settlement Act, it would appear that war contracts entered into after adoption of the Act (i.e. after July 1, 1944) contain an implied condition that such contracts may be terminated upon payment of fair

compensation as defined in the Act. See Ch. XIV, 'The Contract Settlement Act.' This principle would seem to eliminate recovery of anticipated profits on work not done even where such a contract does not contain a termination article".

The same conclusion is reached by writers conversant with the termination problem. Malman, discussing Army Procurement Regulation 15, published August 14, 1943, states (*Policies and Procedures for the Termination of War Contracts*, 10 Law and Contemporary Problems 449, 466-467):

> "Contracts containing no termination article may be terminated and finally settled by supplemental agreement where such termination is to the interest of the Government. Even here, however, and apparently to avoid the consequences of a breach of contract, the contract is to be amended whenever possible to contain the standard form of termination article, or to provide some other mutually acceptable basis of settlement, either before or after the contractor has been ordered to stop work. Where no satisfactory agreement can be reached with the contractor, he may nevertheless be ordered to discontinue further performance. This the War Department recognizes as a breach of contract; PR 15-311 (4) states that the 'contractor may thereafter present his claim if any, for damages arising out of this order, to the General Accounting Office or other courts for settlement.' However, PR-15-311 (4) discourages the use of such orders to stop performance stating that it 'is not consistent' with War Department policy for the Government to commit breaches of contract * * * "

Final proof of the fact that prior to the enactment of the Contract Settlement Act of 1944 (July 1, 1944, C. 358, 58 Stat. 649, 41 U. S. C., Supp. V, 101 et seq.), the government could not, in the absence of an express termination clause, cancel or terminate its war contracts without ordinary liability for breach of contract, is the fact of the adoption of that statute. Both its history and terms une-

quivocally show that it was adopted in order to give the government authority to terminate contracts unilaterally if necessary—which authority did not previously exist in the absence of express contract provisions—and to provide standards for compensation different from those consequent upon breach of contract.

In summary, it is apparent not only that was there no understanding, nor articulated Navy policy or directives by reason of which a government right of unilateral cancellation could fairly or properly be read into the contract here in question, but also that no legal authority for unilateral cancellation existed when the instant contract was executed and terminated. It is equally clear that before 1944 and when the instant contract was executed and cancelled liability for breach of contract was properly assumed to follow in the wake of unnegotiated government termination. Accordingly, what petitioner's present argument resolves itself down to is an attempt to inject an entirely new concept into government contract law. While it has always been recognized that except for qualifying legislative fiat as an exercise of sovereign right, the government's obligation on contracts is the same as that of private parties (*Smoot's Case*, 15 Wall. 36, 47), petitioner now in effect urges that even in the absence of agreement or proper sovereign action by the Congress, its contract obligation is modified by subsequently articulated administrative policy. Such a contention vitiates the necessary doctrine that even the government is governed by law; it is a notion that would be destructive of all public contract relationships.

CONCLUSION.

The judgment of the Court of Claims allowing respondent anticipatory profits is fully supported by its positive findings of fact predicated on substantial evidence, not in the record here, that petitioner and respondent entered into a contract, that petitioner breached the contract and that had respondent been permitted to perform it would

have made a net profit of not less than $80,000. That judgment was required by the ordinary law of contracts and damages applicable to government contracts in the absence —as here—of any controlling contractual or statutory provision to the contrary. Accordingly, the decision below is correct, and there is involved no question of importance or conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 253.

THE UNITED STATES, *Petitioner*,

v.

PENN FOUNDRY AND MANUFACTURING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE RESPONDENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 253.

THE UNITED STATES, *Petitioner*,

v.

PENN FOUNDRY AND MANUFACTURING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE RESPONDENT.

OPINION BELOW.

The opinion of the Court of Claims (R. 22-26) is reported at 110 Ct. Cls. 374. Its special findings of fact and conclusion of law are set out in the record at pp. 16-22 and 22 respectively.

JURISDICTION.

The judgment of the Court of Claims was entered February 2, 1948 (R. 26). Petitioner's motion for a new trial was denied June 1, 1948 (R. 27). The petition for a writ of certiorari was filed August 31, 1948, and granted November 8, 1948 (R. 28). The jurisdiction of this Court is invoked under the provisions of Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939 (Old Judicial Code, 28 U. S. C. 288; New Judicial Code, 28 U. S. C. 1255 (1)).

QUESTIONS PRESENTED.

1. Whether, upon the Government's breach of a binding contract, the Court of Claims' special finding of fact that respondent would have made a net profit of not less than $80,000 and that it was damaged in that amount is conclusive, particularly where the evidence is not before this Court.

2. Whether a contractor's profits anticipated directly from the performance of a contract may be awarded in damages upon breach of that contract by the Government.

3. Whether, in the absence of an express contractual right to terminate, either administrative practice and policy or the First War Powers Act authorized the Government unilaterally to cancel its contract with respondent, and whether, in any event, this question is open on the present record.

STATEMENT.

On June 21, 1944, respondent filed a petition in the Court of Claims to recover its damages arising out of petitioner's unauthorized breach of contract for delivery of certain naval gun mounts (R. 1-14). After full hearings on the evidence and argument, the Court of Claims entered judgment for the respondent in the sum of $80,000 (R. 26) predicated upon its exhaustive special findings of fact (R. 16-22), conclusion of law (R. 22) and supporting opinion (R. 22-26). Thereafter, petitioner's motion for a new trial was denied by order of June 1, 1948 (R. 27).

The facts upon which respondent's claim was predicated and the judgment below was founded are fully detailed in the Court of Claims' Special Findings of Fact (R. 16-22). Briefly, those findings show that respondent is a Virginia manufacturing corporation (R. 16), with an extensive plant and facilities at Waynesboro, Virginia (R. 17). In an endeavor to secure Navy work, respondent, late

in 1940 or early in 1941, made various arrangements and expenditures to prepare itself for such activity. In addition to making numerous repairs to its plant (R. 21), it obtained the services of necessary executive, managerial and engineering employees (R. 17, 21). Early in 1941, respondent entered into negotiations with the Navy Department for the production of gun mounts (R. 17). In April 1941, respondent submitted its proposal and prior to July 1941 gave the Navy a list of equipment owned by it or deemed available for the work (R. 17). A naval representative inspected respondent's plant in July 1941 and talked to the engineer later employed as respondent's general manager (R. 17). After several conferences, in the course of which respondent was requested to and did submit additional data as to its facilities and proposed operations (R. 10), the Navy Department accepted as satisfactory respondent's proposal as to prices, quantities, delivery schedule, payments and options for additional mounts (R. 17).

Respondent's proposal showed that it contemplated subcontracting for production of necessary castings and certain other component parts of the gun mounts, and it had contacted certain producers who were willing to furnish these castings and parts (R. 10, 19). Moreover, respondent had carefully surveyed and planned for its labor supply which was locally available (R. 19).

After the foregoing exchange of data, the Navy, on December 29, 1941, after approval by the Under-Secretary of the Navy, issued a "letter of intent" to the respondent, confirming its previous advice that an order for gun mounts would be placed with it (R. 17-18; Resp. Ex. No. 3, R. 12-13). This letter of intent was accepted by respondent on January 10, 1942 (R. 18).

During January 1942 respondent corresponded and conferred with Navy representatives concerning a suggested performance bond, and respondent thereupon submitted a surety's proposal in that connection (R. 18-19). Testi-

mony below differed as to whether the surety's proposal was accepted by Navy officials as satisfactory when submitted or whether the officials stated that it would be considered to determine whether it was satisfactory (R. 19). In any event, without further questions or objections to the surety's proposal, on February 23, 1942, the Navy mailed an "Official Award of Navy Contract Nos. LL9655[illegible] for gun mounts in the amount of $2,087,555 (R. 13-14)—which was received by the respondent the next day—authorizing respondent "to commence performance of [its] proposal" (R. 20; Resp. Ex. No. 4, R. 13-14). Shortly thereafter, petitioner cancelled the contract (R. 20).[1]

In addition to the foregoing facts, the Court of Claims found that "if the [respondent] had been permitted to perform its contract, it would have made a net profit of not less than $80,000" (R. 21). And the Court entered judgment accordingly (R. 26).

SUMMARY OF ARGUMENT.

I.

A. When the Government enters into a contract with a private party, even with respect to wartime procurement, its rights and liabilities are governed by the law applicable between private parties. Under the established law of contracts and damages, anticipated profits which, as in the instant case, would have resulted directly from performance (by reason of the spread between cost and the con-

[1] Petitioner concedes, for purposes of this case, that the issuance of the notice of award created a binding contract between the United States and the respondent, and that, except insofar as its argument with respect to the alleged right to cancel is concerned, its cancellation constituted a breach of contract (Br. 18-19).

Petitioner's dubious explanation of the alleged error in mailing the notice of award, which it sets out as part of the facts of this case (Br. 8-9), forms no part of the findings of fact below and by petitioner's own argument (see Br. 27-28) cannot be considered here.

tract price) are a proper element of damages upon breach, whether by the Government or private parties.

B. The finding that respondent would have made a net profit of not less than $80,000 had petitioner permitted it to perform the contract is conclusive on the present record because that finding was made by the Court of Claims, acting as a jury, and no testimony has been brought up in the record to show that this finding is not supported by substantial evidence. Accordingly, it must be presumed that there was substantial evidence to support the finding as made.

In any event, various evidentiary findings made show that the ultimate finding as to profits was not speculative. The evidentiary findings which petitioner claims show that respondent was unable to produce in compliance with the contract, when read in the context of all the findings do not show respondent's inability to perform but rather that it would have encountered problems in performance which might have had an adverse effect upon its claimed loss of profits, and this formed the basis of the court's evalution of such findings by appropriate reduction of the quantum of profits allowed.

By well established legal standards the anticipated profits allowed respondent in damages were not speculative or remote because they were the direct expected fruits of production under the instant contract. And since petitioner prevented their more definite ascertainment by preventing production, it cannot object to the fact that the trier of facts made an estimate upon the proof submitted or that the loss of profits resulting from breach cannot be established with mathematical exactitude.

C. The Court of Claims was only required to find respondent's damages resulting from the breach, and not incidental evidentiary facts such as whether it could have performed the contract. Moreover, the finding as to the profits that would have been made implicitly covered the

evidentiary fact that respondent could have performed and made unnecessary any negative finding that respondent could not have performed. The finding as to loss of profits properly took into consideration possible difficulties of performance as a factor in the determination of the amount of such anticipated profits.

II.

A. Petitioner's contention that by reason of administrative policy and the application of the First War Powers Act it had the right unilaterally to cancel this contract cannot be considered here because no evidence was offered to this effect nor was the point raised in the Court of Claims, and its judgment cannot, therefore, be said to be erroneous in this regard. This contention, even if meritorious, would be a matter for timely proof in the trial court.

B. Even assuming this contention is properly presented on the present record, there is no evidence whatsoever that, as of the time this contract was negotiated and terminated, the *Navy* followed such a definitive and controlling practice as to termination clauses in its contracting that the Court would be justified in reading such a clause into this contract.

C. Moreover, no such right of unilateral termination by the Government was conferred by the First War Powers Act. Plainly the language of that statute permitted only such changes in contracts as were brought about by mutual agreement of the parties. In any event, the delegation of authority under the statute effected by Executive Order 9001 was so circumscribed. And both the statute and the executive order were so understood by Congress, the Attorney General of the United States, the War and Navy Departments, the Office of Contract Settlement and writers conversant with termination problems.

ARGUMENT.

I.

THE COURT OF CLAIMS' FINDING THAT RESPONDENT WOULD HAVE MADE A NET PROFIT OF AT LEAST $80,000 IS CONCLUSIVE ON THIS RECORD.

Petitioner, though not so disposed below, concedes that the issuance of the notice of award created a binding contract between it and the respondent (see FN. 1, *supra*) but contends expressly or inferentially:

A. That unearned anticipated profits could not be awarded against the Government;

B. That respondent's loss of profits is speculative and lacks required certainty; and

C. That the Court of Claims erred in not finding that respondent had failed to prove that it could have successfully performed the contract and at a profit.

These contentions will be discussed seriatim.

A. Anticipated profits are a proper element of damages for breach of contract, and this is so whether the Government or a private party commits the breach.

1. THE GOVERNMENT'S LIABILITY ON CONTRACTS IS, EXCEPT AS MODIFIED BY STATUTE, THE SAME AS THAT OF PRIVATE PARTIES.

Because of the inferences to the contrary cast by petitioner's argument, it is appropriate early to dispel the notion that apart from statutory definition the Government does not have the same contractual responsibility as private parties and that its liability upon breach is measured by special or extenuating standards. This Court has long and repeatedly recognized that when the United States enters into contractual relations with a private person, it

is divested of its sovereign character to the extent at least that its rights and duties and its liability for breach are governed by the law applicable to contracts wholly between private parties. See e.g., *Priebe & Sons* v. *United States*, 332 U. S. , 92 L. ed. 95, 98; *United States* v. *Standard Rice Co.*, 323 U. S. 106, 111; *Perry* v. *United States*, 294 U. S. 330; *Lynch* v. *United States*, 292 U. S. 571; *State Nat'l. Bank of Boston* v. *United States*, 96 U. S. 30; *United States* v. *Smith*, 94 U. S. 214; *Smoot's Case*, 15 Wall. 36, 47. See also remarks of Attorney General, quoted *infra* p. 32; Williston on *Contracts* (Rev. ed., 1945), Vol. 9, *War Contract Claims*, Sec. 195; LaBrum, *Termination of War Contracts For the Government's Convenience* (Dec. 1943), 18 Temple L. Q. 1, 9; Graske, *The Law of Government Defense Contracts* (1941) Sec. 134.

As will be shown later in greater detail (See Part II, *infra*, at pp. 32-34), the foregoing principle has been assumed—even by the officers of the Government—to apply with equal force to wartime procurement contracts except insofar as modified by express contractual reservations or by statute.

2. Loss of Anticipated Profits Is a Proper Element of Damages Upon Breach of Contract.

Beyond question, the law of damages allows recovery of anticipated profits upon breach of contract whether by the Government or private parties: *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 379; *United States* v. *Purcell Envelope Co.*, 249 U. S. 313; *Anvil Mining Co.* v. *Humble*, 153 U. S. 540; *Cincinnati Siemens-Lungren Gas Co.* v. *Western Siemens-Lungren Co.*, 152 U. S. 200, 206; *Western Union Telegraph Co.* v. *Hall*, 124 U. S. 444, 454-455; *Hinckley* v. *Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 275; *Phila. W. & B. R. R. Co.* v. *Howard*, 13 How. 307, 344. See also memorandum of the Attorney General quoted *infra* at pp. 32-33. The apparently conflicting propo-

sition quoted by petitioner (Br. 25) is belied both by the the cases cited hereinabove and by examination of the full text of the opinions quoted in petitioner's brief. The reference from *Howard* v. *Stillman & Bierce Mfg. Co.*, 139 U. S. 199, in context is found to concern only disallowance of profits anticipated from engagements patently collateral to or not considered in the contract breached. See discussion *infra*, pp. 18-19. It was meant to apply only to a situation where, for example, A contracts with B for the repair of A's machine and then, upon B's delay, A claims as damages his loss of profits from sales of goods which could have been manufactured had the machine been repaired on time. In such a case, B's breach of the repair contract entitles A to recover damages for breach of the repair contract, but not damages measured by the anticipated profits on his contracts for sale of goods.

Furthermore, petitioner cavalierly dismisses (in a footnote) as clearly inapplicable here the very situation recited in the *Howard* case, *supra*, and in *United States* v. *Behan*, 110 U. S. 338, and raised by the facts of the instant case, where anticipated profits are recoverable. Here "it may reasonably be presumed that [profits on the gun mount contract itself] were within the intent and mutual understanding of both parties at the time" the contract was made, because such contracts are not made without anticipation of profit directly from performance represented by the difference between cost and the contract price. See *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, quoted, *infra*, p. 10.

To avoid the operation of this established rule of damages permitting recovery of direct anticipated profits upon breach of contract by the Government, petitioner argues first, that the profits awarded respondent were speculative, and second—although this argument is not clearly spelled out—that anticipated profits should not have been awarded respondent due to the wartime exigencies under which this contract was let and cancelled. The first argument, even

assuming it can be advanced here, is fully answered in point B immediately following; the second argument is disposed of by Part II of the Argument herein (*infra*, pp. 23-25) and by the answer given to a similar contention in *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 304-305. There the Government resisted payment under certain World War I ship construction contracts on the grounds that the profits provided were too high and unconscionable and that the contracts were entered into by the Government under the duress of war which made it an easy prey for contractors. To such arguments this Court said:

> "... Congress must have anticipated that in the contracts agreed upon profits would be expected and that self interest inherent in commercial transactions would make itself felt. Therefore, in seeking to establish duress from the circumstances in which these contracts were made, the government is relying on the identical circumstances which were in existence at the time Congress chose the policy of authorizing procurement of ships through commercial negotiation. We cannot now invalidate contracts made pursuant to a congressionally selected policy on the sole ground of the coercive effect of circumstances which Congress clearly contemplated. To do so we would have to repudiate legislative power exercised in proper constitutional sphere".

B. The Court of Claims' finding as to loss of profits was not speculative, and in any event is not reviewable.

1. The Finding is Conclusive in the Present State of the Record.

On the present record it is clear that petitioner cannot attack the finding below that respondent would have made a net profit of not less than $80,000 had it been permitted to perform the contract. Prior to the amendment of the provisions of the Judicial Code relating to review of Court

of Claims cases on certiorari,[2] it was the well established rule of this Court that findings of fact made by the Court

[2] The Act of Feb. 13, 1925, c. 229, § 8, 43 Stat. 939; 28 U. S. C. 228 provided that:

> "(b) In any case in the Court of Claims, including those begun under section 287, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause, including the findings of fact and the judgment or decree, but omitting the evidence, be certified to it for review and determination with the same power and authority, and with like effect, as if the cause had been brought there by appeal."

That Act was amended in 1939 (Act of May 22, 1939, c. 140, 53 Stat. 752) to provide:

> "(b) In any case in the Court of Claims, including those begun under section 287 of this title, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.
>
> "The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section [see Rule 99(b), Rules of the Court of Claims].
>
> "In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any findings of fact on a material issue."

Under the New Judicial Code, effective September 1, 1948, the above provisions were recodified into 28 U. S. C. 1255, which although it eliminates much of the language of the 1939 amendment, has the same effect. See official Revisor's note to 28 U. S. C. 1255.

of Claims were conclusive and not subject to appellate review. *United States* v. *Causby*, 328 U. S. 256; *United States* v. *Wells*, 283 U. S. 102, 120; *Fred T. Ley* v. *United States*, 273 U. S. 386; *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533; *Stilz* v. *United States*, 269 U. S. 144; *Saalfield* v. *United States*, 246 U. S. 610; *Wm. Cramp & Sons Ship and Engine Bldg. Co.* v. *United States*, 239 U. S. 221; *Mahan* v. *United States*, 14 Wall. 169. It is the duty of the Court of Claims to deal with conflicting evidence or inferences to which evidence might give rise. *United States* v. *Esmault Pelterie*, 303 U. S. 26. Such findings determine all matters of fact precisely as does the verdict of a jury. *United States* v. *Causby*, 328 U. S. at 268; *United States* v. *Wells*, 283 U. S. at 120; *United States* v. *Esmault-Pelterie*, 299 U. S. 201, 205; *Stone* v. *United States*, 164 U. S. 380. See also Rule 75(b), Rules of the Court of Claims. And this Court is not—so it has said—at liberty to refer to the opinion of the Court of Claims in order to eke out, control or modify the scope of the findings. *United States* v. *Shoshone Tribe*, 304 U. S. 111, 115; *United States* v. *Wells*, *supra*; *Crocker* v. *United States*, 240 U. S. 74.

Nor are the foregoing principles of the finality of Court of Claims' findings of fact less applicable to the instant case by reason of the 1939 amendment of the statute relating to review of Court of Claims judgments. That amendment (see fn. 2, *supra*) permits this Court to review "errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact". But both by the language of the amending act and by established principles of appellate practice such assignments of error cannot be considered in the absence of pertinent portions of the transcript of evidence below. Thus in *Alexandre* v. *Machen*, 147 U. S. 72, 77, this Court held that where review is sought alleging error in the failure to make a finding or in making findings unsupported by evidence, so much of the testimony as was necessary to establish this ground of complaint must be incorporated in the record. And where

the evidence is not contained in the record, it must be presumed to be sufficient to support the findings made. *Canal Bank* v. *Hudson*, 111 U. S. 66, 81.

Accordingly, on the present record it must be assumed that there was substantial evidence to support the finding below as to the net profit respondent "would have made" had petitioner not cancelled the contract, and that finding cannot be reviewed or challenged in the absence from the record of pertinent evidence, nor can it be modified or controlled by reference to the opinion or otherwise. See *Reed's Sons* v. *United States*, 273 U. S. 200, 202.[3]

2. Loss of Profits Was Not Speculative Nor Was the Finding on Loss of Profits Inconsistent With Other Findings.

The tenor and technique of petitioner's challenge of the allowance of anticipated profits illustrates the wisdom of the rule that lower court findings cannot be attacked on appeal in the absence of the evidentiary record. Petitioner argues that the ultimate finding as to loss of anticipated profits was speculative, that it conflicts with evidentiary findings, and that respondent failed to meet its burden of proof on damages (Br. Point A. 2, pp. 20-27). However, the ultimate finding as to loss of profits was patently based upon an evaluation of testimony and other evidence which does not appear in the present record.

For example, the record does not show, and petitioner omits to state, that respondent adduced considerable evidence at the trial below—such as complete cost accounting data and engineering manufacturing estimates—showing

[3] This Court there stated:

> "The argument here consisted mainly of an effort to show, by reference in the brief to portions of the evidence introduced before the Court of Claims, that the contract sued on was made as alleged and that authority to make it had been conferred upon the depot quartermaster. The evidence is not before us; and we must accept the findings of the Court of Claims."

that it would have made a net profit of from 8% to 19% of the contract price (or more than twice as much as the Court of Claims' finding and award). The omission from the findings of such evidentiary matter in support of the ultimate finding as to loss of profits and damages is not of any moment for "the court of claims is under no obligation when assessing damages to specify the elements of the calculation by which it arrives at the result; that itemization is often impossible . . . like a jury, the court may make an estimate and return such sum as the damages recoverable". *United States v. Wyckoff Pipe & Creosoting Co., Inc.*, 271 U. S. 263, 267-8. To the same effect see *United States v. Smith*, 94 U. S. 214, 219. ". . . it is only upon the ultimate facts which the court is bound to find . . . this Court will not take notice of a refusal to find the mere incidental facts, which only amount to evidence from which the ultimate fact is to be obtained." *Alexandre v. Machan*, 147 U. S. 72, 77-78. See also Rule 75(b), Rules of the Court of Claims.

As a matter of fact, the Court of Claims did mention numerous evidentiary factors showing that its ultimate finding as to loss of profits and damages was predicated on a fair and proper evaluation of the evidence and not, as petitioner would have it, upon mere speculation. The court considered evidence showing that respondent had fully and carefully planned for production under the contract (R. 17, 19, 22-23, 25), that it had made various necessary sub-contracting arrangements (R. 19), that it had surveyed and planned its labor requirements and supply (R. 19), that its plant facilities were accepted as satisfactory by the Navy (R. 17), that it had secured expert engineering services for management to be compensated for by a percentage of profit (R. 17; 25), that the respondent was willing to finance performance without advance funds from the Navy (R. 25) and that after various conferences between officials of respondent and the Navy and upon the submission by respondent of detailed supporting

data as to its plans, equipment and proposals, they were accepted as satisfactory and the contract awarded (R. 17, 23-24). Even if the Court of Claims had not marshalled these various evidentiary factors, as it did, it must be assumed that similar evidentiary factors were considered and evaluated in arriving at the ultimate finding of fact that respondent would have made a profit. *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 321.

Ignoring the probative weight of these supporting evidentiary items and without bringing up the evidence to enable this Court to review whether the ultimate finding below is supported by substantial evidence, petitioner argues that the ultimate finding as to loss of profits is inconsistent with other evidentiary findings relating to respondent's preparedness and capacity to have produced the gun mounts in accordance with the contract and at a profit. That argument is patently unsound.

At the outset it should be noted that the allegedly inconsistent evidentiary findings relied upon by petitioner are overstated in its brief. For example, quoting a finding below showing that respondent was not prepared or ready to commence work under the contract, petitioner prefaces the quotation with the statement that this condition existed at the time that the instant contract was awarded (Br. 24). In contrast, reference to the findings below merely shows that these conditions existed on occasions *prior* to the time that the contract was awarded to the respondent. And not a single one of the conditions relied upon by petitioner as showing that respondent could not have performed were unknown to it prior to the time that the contract was negotiated and let. Moreover, statements as to respondent's condition of readiness *prior* to the award are of little significance in view of the facts that the contract may not have been finally awarded respondent; that until the final award was made there was a possibility that it would not be; that respondent had fully planned and made preparations for production, subcontracting and labor supply;

and that when the award was actually made it immediately took steps towards production, although the evidentiary details of the steps taken do not appear in the record here. It might even be said that respondent would have been foolhardy to enter into binding subcontracting and employment arrangements and to commence production prior to the final award in view of the uncertainties that existed.

Thus, evaluating the allegedly inconsistent evidentiary findings in their proper text and context, it is apparent that they were not set out by the Court of Claims as showing, nor do they show, that respondent could not have performed and at a profit. Indeed the Court of Claims specifically found to the contrary. These findings were obviously recited solely for the purpose of showing the basis upon which the Court of Claims arrived at the profit and damage figure it finally adopted. Respondent's evidence had reflected an anticipated profit of from 8% to 10% of the contract price. In assessing the probative force of this evidence, the Court of Claims was met with and gave certain probative effect to petitioner's evidence indicating some possible difficulties in performance. To the extent that there was inconsistency in the evidence—as indeed there generally is in contested litigation—the Court of Claims resolved the conflict by scaling the respondent's anticipated profit down from the claimed 8% to 10% figure to approximately 4% (see R. 26), resulting in the final award predicated on the finding that respondent "would have made a net profit of at least $80,000". That resolution of the evidence was, as this Court has so often stated, the function of the Court of Claims as the finder of fact. While others might have come to a different ultimate conclusion upon the evidence, this does not furnish the basis for appellate disturbance of the finding in the absence of a showing that it was clearly erroneous. *Walling* v. *General Industries Co.*, 330 U. S. 545, 550; *District of Columbia* v. *Pace*, 320 U. S. 698, 702; *Muschany* v. *United States*, 324 U. S. 49, 57-58 and cases cited.

Petitioner also makes much ado (Br. 27) about the fact that several incidental items of proof were mentioned by the Court of Claims in its opinion rather than in its findings of fact. The opinion does not purport to review all the evidence offered by respondent tending to show it would have earned a profit if permitted to perform. Petitioner refers to items mentioned by the Court in its opinion such as that respondent's production manager who was highly thought of by the Government for his experience and ability was willing to work for the respondent on a percentage of profits basis (R. 25), that respondent's stockholders were willing to finance performance without any advance funds from the Government (R. 25), and that the Government might be expected to show some tolerance to war contractors doing their best to perform (R. 25; 26). These items were mentioned by the court below in its opinion as reflecting upon the probability of a profit had respondent been afforded an opportunity to perform. The Court was pointing out in the opinion that the normal profit (8% to 10% as shown by the evidence) would have been allowed here had not the evidence shown that respondent would probably have encountered problems in a new and "untried field". Yet, in reducing the award to "about 4%" the Court commented upon the aforesaid items as additional reasons fortifying its view that even though the normal profit might not have been expected, a real profit was contemplated.

While petitioner here attempts (Br. 27, *et seq.*) to belittle the probative value of the matters mentioned in the Court's opinion, all of them are fully supported by the evidence adduced below—which, of course, is not part of the record here—and the Court of Claims no doubt would have made them part of its findings of fact if they were necessary to support its judgment. However, they were only mentioned as factual circumstances supplemental to the evidentiary and ultimate findings which have already been summarized. Consequently their omission from the

findings of fact is of no consequence, for they served merely as additional explanation of the reasons for the actual findings made. See *United States* v. *Wells*, 283 U. S. 102, 120-121.[4] There are additional observations in the opinion of the same explanatory nature which also are not subject to objection on the score that they should have been included physically in the special findings of fact. Such additional observations include, *inter alia*, those to the effect that in any case where a long term production contract is breached at the outset there may be uncertainties as to what the future might bring (R. 25), that the difficulties which respondent had to overcome were not unique or unanticipated in the vast conversion from peacetime to wartime production (R. 19), and that the belief of both the Navy and the respondent that respondent could perform the contract was implicit in the Navy's acceptance of respondent's proposal which included an option by the Navy to require respondent to produce additional mounts (R. 17).

Finally, it should be observed that petitioner's entire thesis, that the profits allowed as damages by the Court of Claims are speculative, involves a confusion between approximated future profits, a proper item of damages, and purely speculative profits which cannot be awarded upon breach of contract. Where the claimant fails to adduce

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[4] "It is evident that the court did not consider the statements in its opinion, which we have quoted, as additional findings of fact, but as an argument with respect to the conclusion to be drawn from its findings. In its opinion the court was summarizing what it considered to be the effect of its findings, and no useful purpose would be served in returning the case for a specific finding that the motive which impelled the decedent to make the transfers (121) was precisely that which the court has thus definitely stated. While, in accordance with proper practice and the rule of this court, the Court of Claims should have found the ultimate fact, and we do not approve the method it adopted, we are of the opinion that in view of the findings of fact actually made and the conclusion they import, the judgment should be sustained." 283 U. S. at 121.

any proof whatsoever as to loss of profits caused by breach, an award including them would, of course, be speculative. That was the situation in *United States* v. *Behan*, 110 U. S. 338, for there the Court of Claims specifically stated, and this Court noted, that the claimant had adduced no proof whatsoever as to loss of profits and the Court of Claims did not include any such item in its award. Similarly, where profits were not within the contemplation of the parties in entering into the contract, as, for example, where they are the fruits of independent and collateral engagements or contingent upon future bargains, they would be considered speculative. *Western Union Telegraph Co.* v. *Hall*, 124 U. S. 444. Thus in *Howard* v. *Stillwell & Bierce Mfg. Co.*, 139 U. S. 199, damages for loss of profit from the claimant's anticipated productive use of machinery which the other party had contracted to repair was properly denied because such profit was remote to the contract breached in that it was not within the contemplation of the parties in contracting.

In cases such as the instant one, however, the parties obviously contemplated that profit would be made from production under the contract and, consequently, the loss of profits was directly related to and not a remote consequence of the breach. See *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289; *Haddad* v. *Western Contracting Co.*, 76 F. Supp. 987, 990 (N. D. W. Va., 1948). In the sense that unless production were actually completed, the precise profit could not be known, anticipated profits might be said to be speculative. This would appear to be the use to which petitioner puts the term "speculative" in this case. However, that usage would in effect bar recovery of anticipated profits in all cases. Use of the term in that sense is, of course, contrary to established principles of law. Actually, the better description of the anticipated or expected profits proved and allowed below is that they were approximated as indeed they had to be since petitioner prevented performance. *Eastman Kodak Co.* v.

Southern Photo Materials, 273 U. S. 359; *Hoffer Oil Corp. v. Carpenter*, 34 F. 2d 589, 592 (C. C. A. 10, 1929). However, damages are not rendered uncertain because they cannot be calculated with absolute exactness; it is sufficient if a reasonable basis of computation is afforded, even though the result is approximate. *Eastman Kodak Co. v. Southern Photo Materials*, *supra*. See also *Gulf States Creosoting Co. v. Loving*, 120 F. 2d 195, 200 (C. C. A. 4, 1941). As was said in *Needles v. United States*, 101 Ct. Cls. 535:

> "Absolute certainty as to the amount of damages is not essential, this being a matter for determination according to the circumstances of each case. There is no objection to damages that they are difficult to ascertain, depending upon contingent and uncertain events, for in all actions for damages for breach of contract the foundation or underlying principle is full compensation for the wrong done. The breach is the standard by which compensation is to be measured, and all that the law requires is that such damages be allowed as, in the judgment of fair minded men, directly and naturally resulted from the breach of contract for which the suit is brought."

Cf. *United States v. Wyckoff Pipe & Creosoting Co., Inc.*, 271 U. S. 263, 267-8, and *United States v. Smith*, 94 U. S. 214, 219.[5] Certainly the Court of Claims removed any

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[5] There the court stated: "A person who has violated his contract will not be permitted to reap advantage from his own wrong, by insisting upon proof which, by reason of his breach, cannot be furnished. . . .

"A party, who has broken his contract, will not be permitted to escape liability because of a lack of a perfect measure of the damages caused by his breach . . .".

[6] In *United States v. Smith* this Court stated:

> "In the estimation of damages, the Court of Claims occupies the position of a jury under like circumstances. Damages must be proven. The Court is not permitted to guess any more than a jury; but, like a jury, it must make its estimates from the proof submitted. The result of the best judgment of the triers is all that the parties have any right to expect."

possible margin of error or speculation by scaling down the asserted margin of profit so as to allow for possible production difficulties.

C. The Court of Claims did not err in failing specifically to find that respondent could not have successfully performed the contract and at a profit.

As a corollary to its attack upon the finding covering loss of profits as having been speculative, petitioner also contends that the evidentiary findings showed and the court should, therefore, have found as an ultimate fact that the respondent could not have successfully performed the contract. However, petitioner erroneously assumes that the Court of Claims was required to make a separate and specific finding as to whether respondent could have performed the contract. On the contrary, having found that a contract existed and that it was breached—which is conceded by petitioner here (see fn. 1, *supra*)—the Court of Claims was obliged only to make an ultimate finding as to damage (see discussion, *supra*, p. 14) which it did in the specific finding as to loss of profits. An ultimate finding that respondent was damaged includes an implicit finding that respondent could have performed.

In any event, for the reasons already set forth in points A and B above, the alleged error in failing to make a negative finding that respondent could not have performed cannot be considered on the present record, and, even if considered, is not borne out by a proper analysis of the findings below or of the function performed by the Court of Claims. That allegation of error is no more than an expression by the petitioner of its disagreement with the factual conclusion reached by the trier of the facts. As shown in point B, the findings as to the difficulties of performance were only one phase of the evidentiary picture, and apparently they did not convince the Court of Claims that respondent could not have performed. The Court of Claims concluded that this evidence, at most, reflected upon

and was reason for reducing the amount of damages claimed by more than one-half. The ultimate finding that respondent "would have made a net profit of not less than $80,000" if it had been permitted to perform, patently assigned to such evidence probative weight only with respect to the exact amount of damages, and necessarily negated and excluded any possible finding that respondent could not have performed. Only by tortured and unimaginative reading of the specific finding as to the profits respondent would have earned had it been permitted to perform would the question whether it could have performed be left unanswered. In such circumstances, a negative finding was not required by reason of the positive finding covering the same subject and the evidence on which it was based. See *Oregon-Washington R. & N. Co. v. United States*, 255 U. S. 339, 349, where this Court stated:

> "The government further urges that the proposed amendment to finding VI, is covered by findings VI (349) and IX, and is only a request 'to change a negative to a positive finding;' that the amendment to finding X is 'rather an argument that certain conclusions should follow from facts found,' and that 'its conclusion, from the facts found, is that both parties regarded the settlements as final, not as tentative.' The amendment to finding XI, is, the government says, 'a request to find evidence,' which is contrary to the rules; and besides, the evidence is immaterial.
>
> "We concur with the government that the request for findings is an effort to change negative to positive findings. The reasoning of the court expresses implicitly, if not explicitly, a view contrary to that expressed in the request. In other words, the court regarded the settlements of appellant with the government as final, and not tentative."

A comparable situation was similarly disposed of by this Court in *United States* v. *Clarke*, 20 Wall. 92, 112. There an appeal from a condemnation judgment, under the so-called Confiscation Act passed after the Civil War, was based, in part, upon the failure of the trial court specifi-

cally to find that the property belonged to any person within the classes specified in the statute as to whose property condemnation could be effected. Answering this contention, the Court said:

> "Having heard and considered evidence, it must be presumed the court found that the property belonged to a person engaged in the rebellion . . . as well as other facts necessary to the rendition of the judgment."

See also *United States* v. *Wells*, 283 U. S. 102, 120; *Canal Bank* v. *Hudson*, 111 U. S. 66, 81. So too, in the instant case, when the Court of Claims found as an ultimate fact that respondent would have made a net profit of at least $80,000 if it had been permitted to perform, it must be presumed that the court necessarily concluded as an underlying evidentiary fact that respondent could have successfully performed the contract and at a profit. To argue, as does petitioner, that this finding required a separate finding that respondent could have performed is specious argument. In substance, all petitioner contends for is that special finding No. 8 should have been broken down into two separate findings instead of one finding covering both elements. That contention is without any merit.

II.

PETITIONER HAD NEITHER CONTRACTUAL NOR STATUTORY RIGHT TO CANCEL THE CONTRACT WITH RESPONDENT, AND SINCE THIS QUESTION IS OUTSIDE OF THE RECORD, IT IS NOT BEFORE THIS COURT.

A. On the Present Record, Petitioner's Contention as to the Right to Cancel is Untimely.

After the Court of Claims had found that respondent would have made a net profit of at least $80,000, and entered judgment accordingly, petitioner, having previously failed to offer a valid reason for cancelling the contract, moved for a new trial (R. 27) on the ground, *inter alia*,

that the Government had a right to cancel the contract without being liable for damages for loss of profits even though the contract did not contain a cancellation clause. Neither the findings nor the opinion of the Court of Claims, which fully covered all of the defenses raised at the trial, dealt with this contention because it had not been raised at the trial and no evidence had been offered to show whether or not any controlling governmental policy existed at the time the contract was awarded or cancelled which would have authorized cancellation of the contract without ordinary liability. The Court of Claims properly denied the motion for new trial (R. 27), to the extent that it raised this new defense, because the assertion therein that the contract was cancellable was untimely and was not directed to any error whether of law or fact, since the issue had not been presented to or disposed of by the court before judgment.

What petitioner sought by its motion for a new trial and now seeks here violates all accepted judicial patterns, for it, in effect, asks a second opportunity—after full and fair resolution of all issues presented—to offer a theory or defense of which it failed to take advantage when opportunity and procedure required. See *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. 2d 544, 558 (App. D. C.), certiorari denied 305 U. S. 613. This second opportunity was not permissible under the rules of the Court of Claims and should not be afforded here because review of the Court of Claims' judgment is confined to the record (Rule 41; Revised Rules of the Supreme Court) and that record does not show that petitioner's contention as to the right to cancel reflects error by the court below nor that the motion for a new trial first raising this defense "was one made upon evidence or otherwise in accordance with statute". *United States* v. *Seminole Nation*, 299 U. S. 417, 421.

B. When This Contract Was Awarded and Cancelled, Cancellation Was Not Justified by Any Established Administrative Policy Even If Such Policy Is Considered Material Here.

Even assuming, *arguendo*, that petitioner can now urge it, there is obviously no merit to its contention (Br. 36-41) that the award of loss of profits was improper because a termination clause probably would have been inserted in the formal written contract between the parties in view of established wartime procurement policy.

The Court of Claims found and petitioner concedes (see fn. 1, *supra*) that a binding contract between the parties was effected by the issuance of the notice of award. Nothing contained in that contract expressly or impliedly authorized unilateral termination by the Government.[6] Even if that contract could be modified by an alleged procurement policy of the buyer, the existence, application and effect of such a policy should have been the subject of timely proof. Yet, as we have noted, no proof was offered or adduced below upon which any such factual assertions as petitioner now advances could be founded.

In any event, the claims as to alleged government procurement policy have no force with respect to the instant contract. Even were it demonstrable that when this contract was negotiated and executed in late 1941 and early 1942, the War Department adhered to a policy of inserting termination clauses in all or even most of its procurement contracts, there is literally nothing to indicate that the Navy Department, with whom this particular contract was made, followed the same practice at that time. Although petitioner's citation and alignment of references to various reports, affidavits, etc., attempts to convey a contrary impression, examination discloses that not a single one of the references demonstrates that the *Navy*, in contradistinc-

[6] The terms of the contract are those set out in respondent's "proposal contained in schedule Special—Ord" (a government printed form), as amended, and referred to in the "Official Award" accepting the same. (R. 13-14)

tion to the Army, had such a definitive and well adhered to policy when this contract was awarded. Certainly *ex parte* references to statements of Navy officials made in 1943 and 1944 to the effect that termination clauses "developed late in 1941" were inserted in "most contracts" is of no probative value to support the proposition that such a clause would have been inserted in this particular contract negotiated at the end of 1941, assuming that such *ex parte* insertion could have been done. La Brum discussing the status of the War Department's termination policy as of December, 1943—which was then far more advanced than that of the Navy—states that "While termination articles presently appear in most Government contracts, there is no uniform termination article", La Brum, *Termination of War Contracts For The Government's Convenience* (Dec., 1943), 18 Temple L. Q. 1, 18. Obviously, therefore, even some contracts let by the War Department up to late 1943 contained no termination clause.

Actually, the first official Navy requirement that termination clauses should be inserted in procurement contracts was not issued until more than two years after the instant contract was executed. That requirement (Navy Contract Termination Directive No. 1 of February 28, 1944) [7] was issued after the establishment of the Joint Contract Termination Board on November 12, 1943 and the promulgation of the Joint Termination Regulation, effective Janu-

[7] The directive (contained in *Navy Procurement Directives*) states in its first paragraph:

> "The Office of War Mobilization has prescribed a Uniform Termination Article for Fixed-Price Supply Contracts for use by Government procurement agencies and a Statement of Principles for Determination of Costs upon Termination of Government Fixed-Price Supply Contracts. The Secretary of the Navy hereby directs the insertion in all Navy fixed price contracts dated more than thirty days after the date hereof for the manufacture or sale to the Government in the continental United States of war supplies and equipment other than the contracts specified in paragraph 4 hereof, of the provisions set forth in Enclosure (A), which incorporates by reference Enclosure (B)".

ary 8, 1944," both of which "were the result of executive and legislative studies showing the need for uniformity in war contract termination policies and procedures." Accordingly, it is clear that petitioner and respondent did not agree to or contemplate that the Government would have the right unilaterally to cancel the instant contract. It is equally clear that there was no such articulation of *Navy* practice when this contract was executed as would justify any speculative inference upon which to read such a provision into the contract.[10]

C. When This Contract Was Awarded and Cancelled, There Was No Statutory Authority for Unilateral Termination.

Petitioner argues (Br. 41-57) that the Navy "may well have [been] furnished" (see Pet. 21) with the power to terminate this contract by virtue of a provision of the First War Powers Act,[11] empowering the President to authorize any war agency to "enter into contracts and into

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[8] The Uniform Termination Article for fixed price war supply contracts was made effective on the above date by the Director of War Mobilization's directive order No. 1, 9 Fed. Reg. 478 (Directive and subsequent explanatory directives and statements of policy set out in C. C. H., *Government Contracts Reporter*, paragraph 41, 203, *et seq.*

[9] See U. S. Office of War Mobilization Report on *War and Post-War Adjustment* (1944), 90 Cong. Rec. No. 2, January 11, 1944. See also Hearings before Subcommittee of Senate Committee on Military Affairs on *Problems of Contract Termination* (considering S. 1268, S. 1280 and S. J. Res. 80, 78th Cong. 1st and 2nd Sess., 1943-44) which preceded enactment of the Contract Settlement Act of 1944.

[10] Even petitioner can only state that it is "probable" that a termination clause would have been inserted in the formal contract (Br. 36, 41). Unless this is *certain* and respondent was chargeable with knowledge of this certainty, it is difficult to understand the logic by which such a provision could retroactively be read into the contract.

[11] Act of December 18, 1941, c. 593, Title II, Sec. 201, 55 Stat. 839, 50 U. S. C. App., Supp. V, 611.

amendments or modification of contracts whenever he deems such action would facilitate the prosecution of the war . . ."

This contention is an abuse of reason and the plain language of the statute, and is rebutted by consistent administrative interpretation to the contrary. Its vice is that it distorts a legislative grant of authority to amend contracts by negotiation and mutual agreement into a pretended authority for unilateral cancellation.

Notwithstanding petitioner's burdened attempt to find solace in generalizations from the legislative history of the First War Powers Act (see Br. 46-48), there is nothing in that history showing that the Government was intended to have *unilateral* authority to alter, amend or cancel contracts. The broad language of the legislators had reference only to the fact that the ordinary law, statutory or otherwise, was being laid aside to facilitate mutual and speedy negotiation or amendment of contracts.

A review of administrative interpretation and practice under the First War Powers Act confirms this. The pertinent portions of the First War Powers Act were, of course, not self-operative. The Act gave certain powers to the President, but those powers could not be exercised by the contracting agencies administering the provisions without appropriate delegation of authority by the President. By Executive Order 9001[12] such delegation was effected by the President. The pertinent provision of that order (paragraph 3)—which petitioner chooses to overlook (see Br. 42-43)—provided:

> "The War Department, the Navy Department, and the United States Maritime Commission may *by agreement* modify or amend or settle claims under contracts." [Italics supplied.]

Thus, even assuming, *arguendo*, that the First War Powers Act empowered the President to effect unilateral cancella-

[12] December 27, 1941, 6 Fed. Reg. 6787, 3 C. F. R. (1941 Supp.) pp. 330-332.

tions of war contracts, by Executive Order 9001 the President chose not to exercise this authority and instead circumscribed the authority of the contracting agencies to modify, amend or settle contracts by requiring mutual agreement of the contractors and the agencies. That the power delegated was thus limited is apparent from the administrative practice following the issuance of the executive order. Shortly thereafter the Secretary of War submitted to the Attorney General for opinion a proposed subdelegating order which provided:

> "The powers hereby delegated may be exercised by (a) *supplemental agreements* which may modify or amend or settle claims by or against the United States arising under or with respect to any contracts heretofore or hereafter made; (b, *agreements with contractors or obligors* releasing accrued obligations of any sort * * * or (c) *supplemental agreements* and change orders suspending or modifying the operation of existing contracts * * *."[13] [Italics supplied.]

In his opinion as to the validity of the proposed order, the Attorney General confirmed the statutory requirement of bilateral action, stating (40 Ops. Atty. Gen. No. 53, August 29, 1942, at p. 9):

> "In passing the First War Powers Act, *the Congress* desired to enable you (Secty. of War), *and the contractors* who supply you with war material to revise and modify existing arrangements so as to meet the countless dislocations and uncertainties caused by (conditions and exigencies of war, etc.") [Italics supplied.]

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[13] The Secretary's order is quoted in the text of 40 Ops. Atty. Gen., No. 53, August 29, 1942. That opinion, the proposed order and examples of action to be taken thereunder are all set out in full at pp. 360-368 of the Senate Hearings on *Problems of Contract Termination*, *supra* fn. 9.

The same conclusion is evident from an opinion of the Judge Advocate General which states:

> "Under the First War Powers Act, 1941 (55 Stat. 838, 50 U. S. C. 611) and Executive Order No. 9001, issued pursuant thereto
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> > "*The Secretary of the War* may, where it has been administratively determined that it will facilitate the prosecution of the war, *terminate contracts* for the convenience of the government *by entering into supplemental agreements* providing for negotiated lump-sum settlement * * * whether or not such contracts contain clauses authorizing termination by the Government and providing a method of settlement in the event the contract is so terminated."[11] [Italics supplied.]

The Judge Advocate's opinion also quoted a decision of the Comptroller General to the effect that termination settlement would be honored only where the original contracts were so amended "by agreement". That the Navy Department also so construed the authority conferred by the First War Powers Act is apparent from the terms of its directives relating thereto dated September 16, 1942, July 7, 1943 and December 15, 1944, Part IV, Amendments And Modifications of Contracts, *Navy Procurement* Directives, pp. 5711-5715. This was also the view of the

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[11] 1 Bull. J. A. G. No. 5, pp. 304-305, October 1942. The Army Ordnance Department implemented the opinions quoted in the text by advice to its contracting officers on October 9, 1942 that the "Secretary of War has made the administrative determination that negotiated settlements, upon termination for the convenience of the Government when *agreed to by the contractor* will facilitate the prosecution of the war effort and the amendment of existing contracts to provide for such settlements has been authorized under the provisions of the First War Powers Act and Executive Order No. 9011. Existing contracts may therefore *with the contractor's consent* be amended so as to include provisions set forth in paragraph 1". Goldman, *Termination of War Contracts*, 42 Mich. L. Rev. 733, 745. [Italics supplied.]

Office of Contract Settlement established under the Contract Settlement Act of 1944.[15]

The petitioner cannot, of course, gain comfort from the administrative and judicial application of World War I statutes, because vital and controlling differences in terminology make those statutes inapposite. The World War I statutes referred to by petitioner specifically authorized the President to "modify, *suspend, cancel* . . ." [Emphasis supplied to Act of June 15, 1917, 40 Stat. 182] whereas the First War Powers Act of World War II merely gave the power to amend, not to cancel. Moreover, those World War I statutes are no longer operative.[16]

That petitioner's present argument as to its statutory right of unilateral cancellation is made of whole cloth is apparent from the Attorney General's contrary disposition of the problem in 1943. During the course of the Senate hearings on the problem of contract termination, Senator James E. Murray, Chairman of the Subcommittee, wrote

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[15] A pamphlet report of that Office of July, 1947, entitled *A History of War Contract Terminations and Settlements* states (Ch. IV, p. 7):

> ". . . the War Department amended its termination article to include an alternative provision for negotiating a settlement. The theory of this was that the contractor's termination claim could be compromised and adjusted by agreement between the parties as businessmen would do in private transactions. . . . The legal basis for this concept was the First War Powers Act of December 18, 1941 . . . On August 29, 1942, the Attorney General issued an opinion (40 Ops. Atty. Gen. No. 53, 1942) that this statute authorized the settlement of termination claims by negotiation."

[16] The Act of June 15, 1917 was merely an annual Urgent Deficiency Appropriation Act. The other World War I statute referred to by petitioner, the Dent Act (Act of March 2, 1919, 40 Stat. 1272) was self-liquidating as to World War I contracts, for by its terms it applied only to agreements entered into prior to November 12, 1918 provided also that the contractor presented his claim prior to June 30, 1919.

to the Attorney General, under date of November 20, 1943, as follows:

> "Seventh, many divergent views have been presented to members of the Committee concerning the common-law rights of a contractor whose contract has been terminated, as distinguished from his rights under a termination clause. Would it be possible for you to analyze these common-law rights in detail for the benefit of the committee, comparing them point by point with the rights of a contractor under the standard clause now used by the War Department."[17]

In response, the Attorney General submitted a memorandum stating:

> "7. Common-Law Rights of a Contractor Whose Contract Has Been Terminated, Compared With a Contractor's Rights Under a Termination Clause.
>
> "In general it may be said that the difference between the common-law rights of a contractor whose contract has been terminated and the rights given by the standard termination clause now in use by the War Department is the difference between the right to recover damages for a breach of contract and the right to have the contract performed in accordance with its terms. * * *
>
> "In the event of the termination of a contract that does not contain a termination clause, where the contractor does not agree to terminate and there is no exercise of the Government's power of eminent domain, and where the contractor is satisfactorily performing his part of the agreement at the time of termination, the Government's refusal to accept complete performance and to pay the agreed consideration in full would, in normal circumstances, constitute a breach of the contract for which the contractor would be entitled to recover damages. In such case, generally speaking, a court would attempt to give the contractor a judgment which would place him in the same financial position as if the contract had been fully performed. However, there are a number of conditions which the contractor would have to meet in order to

[17] Senate Hearings, *supra*, fn. 9, Part 5, pp. 521-522.

> be assured of complete relief. For example, he would have to demonstrate that he had taken reasonable steps to mitigate his damages; that particular items of loss were reasonably within the contemplation of the parties as probable consequences of a breach, and that they were occasioned by the breach; that anticipated profits claimed to have been lost would have been earned but for the breach, and that they were not too speculative and remote; . . ."[18]

Thus at a point of time determinative of the rights and liabilities in this cause, the Attorney General unequivocally stated to the Congress, as a basis for legislative action, that absent a termination clause, the Government was liable for breach of contract upon its unilateral cancellation and that in such event anticipatory profits could be recovered. The same view was expressed and acted upon by the contracting agencies. Thus the War Department's text, *Government Contracts and Readjustment* (published for use by J. A. G. officers) states that ordinary liability for breach follows from cancellation of a contract without a termina-

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[18] *Senate Hearings, supra, fn. 9, at p. 529.* Earlier during the same Senate hearings, Attorney General Biddle confirmed the necessity of bilateral action to avoid the consequences of breach by stating (p. 343):

> "Even in the absence (from the contracts) of the termination provisions which I have mentioned, I think it clear that the contracting agencies have the power to negotiate with their contractors for the termination of contracts * * *"

Petitioner attempts (Br. 51-52, fn. 24) to alleviate the telling effects of the Attorney General's 1943 memorandum by characterizing it as having been confined solely to a discussion of common law rights. However, the Committee and the Attorney General were concerned with the respective rights and liabilities of the Government and the contractor in the absence of a contractual termination clause. Both the Committee and the Attorney General obviously assumed—and correctly—that in the absence of such a clause, both parties were governed by the common law of contracts and damages and that no statute (including the then extant First War Powers Act) altered the applicable common law.

tion clause except insofar as an implied termination clause might be read into contracts entered into *after* enactment of the Contract Settlement Act of 1944.[19] That text reads as follows (at pp. 159-160, 178-179 (fn. 50)):

> "To permit such termination without liability for breach of contract, the War Department, since 16 September 1941, has included in its contracts a termination article giving the Government the right to terminate the contract for its convenience or its option."
>
> "The Government is liable for breach of contract where it prevents performance by the other party to a contract. See Ch. VIII, 'Performance and Breach by the Government'. Ordinarily cessation of the war or lack of use for the war material contracted for does not relieve the Government of liability under a duly authorized contract. It has, however, been held that the existence of a statute authorizing the President to terminate a war contract and pay reasonable compensation to the contractor will bar recovery of anticipated profits, on the theory that the statute was an implied condition of the contract. *Buffalo Union Furnace Co. v. United States Shipping Board Emergency Fleet Corp.*, 291 Fed. 23 (C. C. A. 2d, 1923). See also *Russell Motor Car Co. v. United States*, 261 U. S. 514 (1923). This principle might be applied to war contracts not containing termination articles in view of the provisions of the Contract Settlement Act."
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> * * * * * * *
>
> "Under principles applied by the courts in the construction of war statutes similar to the Contract Settlement Act, it would appear that war contracts entered into after adoption of the Act [i.e. after July 1, 1944] contain an implied condition that such contracts may be terminated upon payment of fair compensation as defined in the Act. See Ch. XIV, 'The Contract Settlement Act.' This principle would seem to eliminate recovery of anticipated profits on work not done even where such a contract does not contain a termination article."

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[19] Act of July 1, 1944, 58 Stat. 649, 41 U. S. C., Supp. V, 101 *et seq.*

The same conclusion is reached by writers conversant with the termination problem. Malman, *Policies and Procedures for the Termination of War Contracts*, 10 Law and Contemporary Problems 449, 466-467, discussing Army Procurement Regulation 15, published August 14, 1943, states:

> "Contracts containing no termination article may be terminated and finally settled by supplemental agreement where such termination is to the interest of the Government. Even here, however, and apparently to avoid the consequences of a breach of contract, the contract is to be amended whenever possible to contain the standard form of termination article, or to provide some other mutually acceptable basis of settlement, either before or after the contractor has been ordered to stop work. Where no satisfactory agreement can be reached with the contractor, he may nevertheless be ordered to discontinue further performance. This the War Department recognizes as a breach of contract; PR 15-311 (4) states that the 'contractor may thereafter present his claim if any, for damages arising out of this order, to the General Accounting Office or other courts for settlement.' However, PR 15-311 (d) discourages the use of such orders to stop performance stating that it 'is not consistent' with War Department policy for the Government to commit breaches of contract * * *"

See also LaBruna, *Termination of War Contracts for the Government's Convenience* (Dec., 1943), 18 Temple L. Q. 1, 9.

Finally, it should be observed that petitioner has not been able to quote or cite any authority—indeed all are to the contrary—specifically stating that under the First War Powers Act the Government had the right unilaterally to cancel a war contract without ordinary liability for breach of contract.

SUMMARY.

From what has been said it is clear that the instant contract neither expressly, nor impliedly by reason of any established administrative policy or pertinent statute, authorized unilateral termination by the Government. It is equally clear from accepted administrative interpretation and from established principles of government contract law that, during the period here in question, in the absence of a termination clause ordinary liability for breach of contract—including the assessment of damages for loss of anticipated profits—results from a unilateral termination.[26]

It has also been shown that, exercising its proper function *qua* jury, the Court of Claims exaluated conflicting evidence as to probable loss of profits and damages and made an ultimate finding of fact in that regard which on the record reflects a proper effort to ascertain the fair minimum measure of respondent's loss and which, in the absence of a showing that such finding is not supported by substantial evidence, must be taken as conclusive here.

Accordingly, petitioner's present argument resolves itself into an attempt to inject an entirely new but vague concept into government contract law. Although it has long been recognized that, unless varied by the contract itself or by proper legislative action by the sovereign, the Government is liable for breach of contract and for the same measure of damages as are private persons, petitioner now asks the Court, in effect, to establish separate standards for governmental contractual liability. The touchstone of liability and damage would not be the contract, the established law of contracts and damages, nor legislative fiat. It would be an illusory inquiry into such factors as the vagaries of inarticulated administrative practice, the peculiar exigencies of the contracting agency involved and an un-

[26] ". . . in the absence of a statute or a termination clause, recovery upon the theory of breach is proper." Williston on *Contracts*, (Rev. ed., 1945), Vol. 9, *War Contract Claims*, Sec. 116.

determined and vague standard by which no one could measure his rights under any contract with the Government.

Such notions would, respondent submits, be destructive of law and run contrary to our basic concept that even the Government is governed by law. It would destroy the standard upon which the Government contracts with industry. Indeed, if the present applicable standards of contractual liability are not deemed sensible for the treatment of government contracts, appropriate steps can be taken by the Government to utilize different contractual provisions or seek pertinent legislation. See *United States v. Bethlehem Steel Corp.*, 315 U. S. 289, 309. Under the instant contract and existing legislation, established legal principles must be applied and they support the judgment below.

CONCLUSION.

For the reasons stated above, it is respectfully submitted that the judgment of the Court of Claims is correct and that it should be affirmed.

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January, 1949.

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CHARLES ELMORE CROPLEY

No. 253

IN THE

Supreme Court of the United States

October Term, 1948

253

THE UNITED STATES, *Petitioner*

vs.

PENN FOUNDRY AND MANUFACTURING COMPANY, *Respondent.*

RESPONDENT'S PETITION FOR REHEARING OR FOR MODIFICATION OF JUDGMENT REMANDING CASE TO COURT OF CLAIMS FOR ADDITIONAL FINDINGS.

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WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

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PETITION FOR REHEARING, OR FOR MODIFICATION OF JUDGMENT REMANDING CASE TO COURT OF CLAIMS FOR ADDITIONAL FINDINGS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

For the reasons set out below, respondent respectfully petitions the Court for a rehearing in this cause or for a modification of the Court's judgment of May 31, 1949 so as to remand the case to the Court of Claims for additional findings, consistent with the issues raised by the majority and concurring opinions of this Court.

THE OPINIONS HEREIN

This was an action by respondent against the United States for loss of anticipated profits alleged to have been caused by the latter's cancellation of a contract made on February 23, 1942 for the production of naval gun mounts.

The majority opinion of this Court was predicated on the conclusion that the findings of fact made by the Court of Claims were not sufficient to sustain its judgment for respondent because of (1) the absence of findings showing the readiness and capacity of the respondent to perform certain of its contractual obligations upon which its profits were contingent and (2) the presence of certain affirmative findings which precluded the drawing of any sufficient inference of such readiness and capacity from other findings. The Court reversed the Court of Claims and remanded the cause with a direction to enter judgment in favor of the United States. *Mr. Justice Reed* and *Mr. Justice Jackson* concurred in reasoning of the majority for reversal, but would not have judgment entered for the United States because, in their opinion, respondent should have an opportunity upon remand to meet the stated requirements of proof.

The four concurring justices, in an opinion written by *Mr. Justice Douglas*, agreed to the form of judgment advanced by the majority but upon the ground that respondent had not carried the burden of showing that during the period in question, there was no mandatory policy of the Navy to require a cancellation clause in its contracts, or that respondents would, for one reason or another, have been saved from the application of that policy.

The burden of this petition is (1) that the reasoning of both the majority and concurring opinions are rebutted both by the record below and war contract experience, and (2) that in any event, as pointed out by the dissenting Jus-

tices, respondent should have the opportunity upon remand, in accordance with the historic practice of this Court, to have further findings made to supply the alleged omissions found by the majority and concurring opinions because those omissions were not occasioned by any failure of proof on respondent's part but were, rather, the result of deficiencies in the judgment and findings of the Court below and/or the failure of the Government to raise an issue in the court below upon which the court below could rule.

I.

THE EVIDENCE BEFORE THE COURT OF CLAIMS IS SUFFICIENT TO SUSTAIN ITS ULTIMATE FINDINGS AND JUDGMENT AND TO SUPPORT ADDITIONAL EVIDENTIARY FINDINGS REQUIRED BY THE MAJORITY OPINION.

Respondent requested the Court of Claims to make evidentiary findings to support the ultimate finding (No. 8) to the effect that

> "If the plaintiff (respondent) had been permitted to perform its contract, it would have made a net profit of not less than $80,000" (R. 21)

Those requests, set out below, were fully supported by detailed references to the transcript of evidence in the Court of Claims and were at no time answered or rebutted.[1]

---

[1] Defendant below failed in its "Motion for a New Trial and Brief" to give even one reference to the transcript of evidence in support of the Commissioner's Report, and in opposition to the Court's Findings, as required by Rule 93 of the Court of Claims which requires that,

> "A motion founded upon an error of fact shall specify with minuteness the fact or facts which are regarded as erroneously found or erroneously omitted to be found by the Court, *with full reference to the evidence which is relied upon to support the motion*."

When the government filed its petition for certiorari, it failed to include in the Record the parts of the record below material to the errors

Abstract of Plaintiff's Requested Findings of Fact in Court of Claims:

1. Information as to the sources of supplies and sub-contractors were furnished it by the Gun Mount Section. (R. 44, below, Tr. 787-788).

2. Plaintiff's facilities and the amount of sub-contracting it had arranged to use, as shown by the Navy inspections, were such that the gun mounts called for by the contract could have been produced by plaintiff in accordance with plaintiff's proposal which was accepted. (R. 41, below, Tr. 155, 177, 174, 197, 138, 140, Plf's Exs. 14 and 19).

3. As requested by the Navy plaintiff registered with and was accepted by the Department of State as an Arms Manufacturer. (Id. R. 41, Tr. 38, 39).

4. Plaintiff had more equipment than was required to perform the contract to build the gun mounts. (R. 42, Tr. 5, 8, 69, 70, 203, 204).

5. If any additional machinery was necessary it could have been obtained by plaintiff. Financial arrangements had been made with the Federal Reserve Bank in Richmond, Va., if additional financing became necessary (R. 48, Tr. 221, Plf's Ex. 19).

6. Plaintiff furnished the Navy with copies of arrangements with sub-contractors relating to the work to be sublet after negotiations had been conducted with them. (R. 48, Tr. 149, 187, 199, Plf's Ex. 13).

7. Plaintiff's Chief Engineer, Mr. Kennedy, was to handle the manufacture of the gun mounts, and was considered

---

assigned. Although respondent had the right to request such parts of the record as supported ultimate finding No. 8, it did not do so, because it believed that under 28 U. S. C. § 288 (b), it was petitioner's duty to request that the record include parts of the transcript of evidence to support its alleged errors assigned, and if such request had been made, then respondent would have requested additional parts of the transcript of evidence to support the lower court's ultimate finding.

by the Navy officials to be very able, and well qualified to perform the task. (R. 49, Tr. 129, 132, 384, 759-760, 780). He prepared specifications based on the Navy's blueprints, tool and die design (R. 49, 136, 137). There was an adequate labor supply of both skilled and unskilled labor immediately available in plaintiff's area and the contract to plaintiff was of general local interest (R. 49, Tr. 166, 172, 173, 177, 186, 241).

8. Based upon costs and engineering, engineering manufacturing estimates computed from a study of machine tool operations and sub-contract prices, it appeared that if plaintiff had been permitted to perform the contract its profit would have amounted to 25% of the contract price of $2,087,000 or a gross profit of $500,000 (R. 54, Tr. 146 (Kennedy) 148, 149, 198, Plf's Ex. 12) and this sum was subject to reduction by certain costs and overhead expense items which would result in a net profit to the plaintiff of approximately 8% to 10% of the contract price, or a net profit of $167,000 to $208,000. (Id.) (Tr. 150-151)

In addition to the findings requested by respondent in the Court of Claims, respondent would have had additional protection under the then existing policy for all Navy contractors, of no expense for a bond, no liquidated damage clause, and the usual escalator clause if a formal contract had been executed. (See reference to record in Pownall v. U. S., 334 U. S. 742, R. 178, 179).

Respondent and its Counsel are deeply and sincerely convinced that if this cause is remanded, with instructions to the Court of Claims to review the testimony and, if deemed necessary, to take further testimony where deficiencies of proof exist, if any, that it will, of necessity, based upon such review, make additional findings which will fully meet the objections raised both in the majority opinion of the Court and in the concurring opinion.

But if the Court of Claims should fail, upon remand, to make additional or clarifying findings satisfactory to this

Court, all parties would have the satisfaction that full justice has been done upon a complete record and in conformity with the views of this Court.

This course could not, in any way, prejudice the rights of either party.

Respondent submits that further exploration of the record below and a remand for further evidentiary findings will clarify other objections found by this Court to the findings.

For example, objections to the Court of Claims' statement in its opinion that respondent would have received the same consideration and tolerance that the Government showed other war contractors would be eliminated because this observation although supported by the uniform experience of World War I contractors (see affidavit of H. S. Hensel at pp. 12, 13, *infra*,) was not required to support finding No. 8 and the judgment below in view of the ample evidence in the transcript below that respondent with its sub-contractors was fully capable of performing the contract.

Moreover, that part of Finding 5 quoted on page 14 of the majority opinion here as being adverse to respondent is refuted by the weight of the evidence below as reflected by respondent's requested findings (see pp. 4, 5 supra), and is in conflict with Findings Nos. 2, 3, 4 and parts of 5 and 8.

II.

AFTER THE CONTRACT WAS AWARDED IN FEBRUARY, 1942, A TERMINATION CLAUSE COULD NOT AND WOULD NOT HAVE BEEN INSERTED.

As respondent noted in its principal brief (pp. 23-35), the argument that a termination clause could and would have been inserted in the formal contract based upon the award of February 23, 1942, *was not raised by the Government until after the proof was closed below* and then by the Government's motion for a new trial.

In the petitioner's Supplemental Memorandum filed in this Court, it is admitted that

> *"The Government raises no question with regard to the Court of Claims' finding that the Navy's Notice of Award was validly issued, and created a binding agreement between the United States and respondent."* (pp. 2 and 3)

Never before has this Court, or any Court, to our knowledge, held that after a binding contract has been effected, either party could without the consent of the other and without any established statutory right, as is the case here, later require that the contract contain a clause to permit cancellation without damages to the party who breached the contract. Here the Government's position is far weaker, for the right to insert a termination clause later is attempted to be predicated upon the existence of an alleged administrative policy, no specific evidence of which has been introduced by the Government to the date of this petition.

The concurring Justices have stated that it was respondent's burden to show that the alleged termination policy said to have been effective in February, 1942, would not have covered the particular contract in question. Obviously, respondent did not and could not request finding of facts in the Court of Claims as to whether the United States had a right to cancel this contract or as to whether the particular contract was excepted from a generally existing right of cancellation, because the Government had not then asserted its alleged right to cancel. Respondent respectfully submits that a full exploration of all the available evidence of Naval contract termination policy as of February 1942, when this contract was awarded, would demonstrate that there is no evidence that there was an established and controlling policy at that time to require termination clauses in *all* contracts or in the contract here in question.

The type of issue here involved is beyond the historical application of the doctrine of judicial notice. In *Brown* v. *Piper*, 91 U. S. 37, 41-43, 23 L. ed. 200, 201, 202, the Court stated that:

> "'Courts will take notice of whatever is generally known within the limits of their jurisdiction . . . [but] this power is to be exercised by Courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative.'"

Similarly, in *Ohio Bell Telephone Co.* vs. *Public Utilities Commission*, 301 U. S. 292, 300-303, 81 L. ed. 1093, 1100, Mr. Justice Cardozo excoriated an administrative body for improper use of the doctrine of judicial notice, stating:

> "Courts take judicial notice of matters of common knowledge. 5 Wigmore, Evidence Secs. 2571, 2580, 2583; Thayer, Preliminary Treatise on Evidence, pp. 277, 302. They take judicial notice that there has been a depression, and that a decline of market values is one of its concomitants. Atchison, T. & S. F. R. Co. v. United States, Dayton Power & L. Co. v. Public Utilities Commission, and Central Kentucky Natural Gas Co. v. Railroad Commission, supra. How great the decline has been for this industry or that, for one material or another, in this year or the next, can be known only to the experts, who may even differ among themselves. For illustration, a court takes judicial notice of the fact that Confederate money depreciated in value during the War Between the States (Wood v. Cooper, 2 Heisk, 441, 447; Hix v. Hix, 26 W. Va. 481, 484, 485), but not of the extent of the depreciation at a given time and place. Modawell v. Holmes, 40 Ark. 391, 405. Cf. Feemster v. Ringo, 5 T. B. Mon. 336, 337; Baxter v. McDonnell, 155 N. Y. 83, 93, 49 N. E. 667, 40 L. R. A. 670. The distinction is the more important in cases where as here the extent of the fluctuations is not collaterally involved but is the very point in issue. Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of

the burden of resorting to the usual forms of evidence. Wigmore, Evidence, Sec. 2567; 1 Greenleaf, Evidence, 16th ed. p. 18. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.' Ibid. Cf. Shapleigh v. Mier, 299 U. S. 468, ante, 355, 57 S. Ct. 261.

No rational concept of notoriety will include these variable elements. True, 'the category is not a closed one. 'The precedents of former judges, in declining to notice or assenting to notice specific facts, do not restrict the present judge from noticing a new fact, provided only that the new fact is notorious to the community.' 5 Wigmore, Evidence, Sec. 2583. Even so, to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case has been submitted, would be to turn the doctrine into a pretext for dispensing with a trial."

Petitioner, in raising the question of termination for the first time, in its motion for a new trial before the Court of Claims, stated (page 7):

"The same policy [Army termination procedure] was followed by the Navy, *although there is no evidence to show the exact date when the inclusion of such a termination article in Navy contracts became mandatory.* In view of the close cooperation between the two services in the handling of supply problems, it is reasonable to assume that Navy practice responded to that of the Army, and that by the first quarter of 1942, a termination article was a standard part of any procurement contract." (Emphasis supplied)

And even so recently as in its Supplemental Memorandum submitted to this Court, petitioner stated—

"It is impossible now to ascertain what the provisions of that definitive contract would have been, since they were to be determined by negotiation, and no such negotiation in fact took place. Especially at that time (Spring 1942) the contract provisions used by the war procuring agencies were in a flux and constantly

varied to meet newly-discovered problems or to cure working defects in existing forms." (Pages 5, 6)

In the *Navy's Directives as to General Procurement Policy*, and its amendments up to June 1, 1943, Dec. 28, 1941 (Q. W. 20 L43 (41122S)) PLD (MSH; Shf), stating what clauses were required by law, and otherwise, *a cancellation clause* is not included. And in the Attorney General's Memorandum in response to a letter dated November 29, 1943, from James E. Murray, Chairman of the Subcommittee, he stated—

> In the event of the termination of a contract that does not contain a termination clause, where the contractor does not agree to terminate and there is no exercise of the Government's power of eminent domain, and where the contractor is satisfactorily performing his part of the agreement at the time of termination, the Government's refusal to accept complete performance and to pay the agreed consideration in full would, in normal circumstances, constitute a breach of the contract for which the contractor would be entitled to recover damages. In such case, generally speaking, a court would attempt to give the contractor a judgment which would place him in the same financial position as if the contract had been fully performed.

From these statements it is clear that the Government itself is not able to state definitely when the policy of including termination clauses was generally effective and compulsory, so that certainly the Government cannot definitely state that on February 23, 1942, such a clause would have been required for the particular contract here. Since petitioner, and not respondent, has access to all Navy contracts executed during the period here involved, were there any contracts to support its contention they would have been produced before this Court or, more properly, before the Court of Claims. As a matter of fact, respondent has attached hereto as Appendix A, correspondence between the Chairman of the Ways and Means Committee, House of Representatives, and the Chief of the Bureau of Sup-

plies and Accounts, Navy Department, from which it is abundantly clear that the Navy cannot produce any evidence specifically demonstrating that in February, 1942, all contracts, including that such as is involved here, would have required a termination clause.

It seems indisputable that if it were common knowledge and a notorious fact that in February, 1942, termination clauses were required, this fact would have been known to the Government itself and would have led to the timely presentation of appropriate evidence. In the absence of such specific proof the matter is patently outside the scope of the doctrine of judicial notice. It might well be, as Mr. Justice Cardozo pointed out, that this Court could take judicial notice that some time during the late war a policy of inserting termination clauses was developed. But that is far different from taking judicial notice as to the *exact* time when such a policy was developed, and used, and the exact terms required by such a policy. The latter would appear to be a matter for specific proof and ordinary evidentiary examination.

Nor does the Forrestal statement of January 11, 1944, referred to by the concurring Justices, supply the gap. We do not question the above statement, as it covers the period from "late in 1941 to January 11, 1944", but the fact is that there were few if any contracts in 1941, and the spring of 1942 and later in 1942, which contained cancellation clauses, as such were not included then unless agreed to by the contractor and were not included in the Navy Directives issued December 28, 1941, as amended through June 1, 1943. So the term used by Mr. Forrestal, "Most contracts" covering the period from late 1941 to January 1944 does not indicate that cancellation clauses were used in most contracts in the early part of 1942, the period herein in question. In fact, such cancellation clauses were not used until late 1942, very few then, and 1943; and not made mandatory until February 28, 1944. (See our brief, page 26).

Apparently, the concurring Justices, in alluding to the Forrestal statement as an indication of Navy policy during the time in question, overlooked more detailed and forceful statements of other responsible officials. For example, on July 10, 1945, H. S. Hensel, stated in an affidavit made a part of the Transcript of Record in *Alexander Wool Combing Co. v. United States*, 334 U. S. 742 (referred to in the footnote of this Court's opinion, pages 2 and 8) that he was Chief of the Procurement Division of the Navy from July, 1941 to August, 1944, (R. 177), and that:

> "The Secretary's directive of December 28, 1941, established a new internal Navy procedure for clearing contracts negotiated under the War Powers Act; in addition it delegated to contracting officers complete discretion with respect to the form of such contracts, except for certain specified provisions required by statute or by executive order." (R. 223)
>
> "In 1941 and early 1942, I should judge that the great majority in dollar amount of fixed-price contracts provided escalation in some form or another * * * and * * * invariably also contained allowances for many contingencies not covered by escalation." (R. 189)
>
> "In general, Navy contractors in 1941 and early 1942 were including in their fixed price of estimated cost * * * allowances for almost all contingencies which could conceivably happen. * * *" (R. 190)
>
> "The contractor would not undertake the work without adequate protection and the Navy Department had no valid argument, in the light of the uncertainties as to costs facing the contractor, for rejecting allowances for the protection of the contractor. * * *" (R. 190)
>
> Navy Department must continue to rely upon the '*profit motive*' as an important factor in inducing war production. * * *" (R. 210)
>
> "After the passage of the War Powers Act performance and other bonds were largely dispensed with * * *"

"Navy Contract (except Bureau of Ships contracts) at this time (after the Procurement Legal Division was authorized to handle such matters in Aug. 1942) provided that in the event of cancellation for the convenience of the Government, the Navy would pay the contractor, * * *" (R. 227)

"After the First War Powers Act, the Navy dropped almost entirely the liquidated damage clause. * * * In addition, contractors were extremely reluctant to take contracts containing such clauses. As the Navy was interested in getting the goods themselves, and not money damages, it determined to omit this clause generally." (R. 227).

The Hensel affidavit patently demonstrates that (1) in February, 1942, contracts were entered into by negotiation and not by competitive bids; (2) at that time there was no standard form of Navy contract and contracting officers were delegated complete discretion as to the form of contracts except for certain specific provisions required by statute or executive order which, of course, did not include a termination clause; and (3) in general, contractors could demand and did receive the protective clauses they desired, and all objectionable clauses, such as cancellation clauses, requirement of bond, liquidated damage clause and termination clauses, were eliminated where the contractors objected in order to induce them to produce for the Navy. And that the same policy generally prevailed for the entire war production program is evident from the statement of the Attorney General quoted at pages 29-32 of our principal brief and also from statements of the Under Secretary of War, Robert P. Patterson, who had charge of all War Department procurement, which statement appears at pages 128 and 129 of the Transcript of Record in *Alexander Wool Combing Co. v. United States*, 334 U. S. 742.

III.

IN ACCORDANCE WITH THE ESTABLISHED POLICY OF THIS COURT, THIS CASE SHOULD BE REMANDED TO THE COURT OF CLAIMS FOR ADDITIONAL FINDINGS IN THE EVENT A REHEARING IS DEEMED INAPPROPRIATE.

Since the case of *United States v. Alonzo*, 9 Wall. 661, 19 L. ed. 808, this Court has consistently held that where there are insufficient findings, or the findings appear to conflict, the case should be remanded to the lower Court for additional findings and/or clarification of its existing findings.

Fidelity & Deposit Co. v. U. S., 259 U. S. 296;

U. S. v. Esnault-Peterie, 299 U. S. 202;

Marconi Wireless Teleg. Co. v. U. S., 320 U. S. 1, 48, 49;

Frank W. Mogal v. U. S., 323 U. S. 424.

See also *Fountain v. Filson*, 93 L. ed. 768, where this Court held that the reversal of a judgment and a remand on directions to enter judgment, where issues had been raised on which no evidence had ben adduced, improperly denied the losing party the right to meet an issue not tried.

There is no reason in this case to depart from this established policy of this Court, permitting clarification of findings below and particularly with respect to issues (the question of the right to cancel) upon which respondent has had no opportunity as yet to have a full evidentiary exploration. Moreover, for the reasons previously assigned, there is every reason to believe that the deficiencies noted in the majority and concurring opinions of this Court can be fully rectified, on an appropriate remand permitting clarification and additional findings by the Court of Claims.

Under Rule 33 of this Court, a rehearing may be granted where there are "substantial grounds available to peti-

tioner although not previously presented", citing the case of *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U. S. 47, 50.

CONCLUSION

Accordingly, respondent respectfully submits that even if this Court should deem a rehearing inappropriate, this case should be remanded to the Court of Claims with directions to make additional findings and to take additional testimony, if necessary, to resolve the issues raised by this Court.

By no other means can this Court have brought to its consideration all of the necessary facts for the establishment of the just rights of the parties.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Robert H. McNeill, attorney for respondent certifies that respondent's Petition For a Rehearing, or For Modification Of Judgment Remanding Case To Court of Claims For Additional Findings is presented in good faith and not for delay.

ROBERT H. MCNEILL
Attorney for Respondent

APPENDIX

PLAINTIFF'S EXCEPTIONS TO COMMISSIONER'S REPORT AND REQUEST FOR SPECIAL FINDINGS OF FACT. (IN COURT OF CLAIMS)

Finding 1.

No exception.

Finding 2.

The plaintiff requests that the following addition be made to this finding:

Inventories during January 1941 and April 1941 showed that plaintiff's plant consisted of a machine shop and foundry equipped with automatic screw machines and lathes up to a 14-foot boring mill, blacksmith shop, oven rooms, tool rooms, office buildings, etc., and included more equipment than was required to perform a contract to build gun mounts. (Tr. 5, 8, 69, 70, 203, 204—Plaintiff's Exhs. 1, 18.) The plant was located on approximately 6 acres of land and the buildings were made of brick and stone with metal roof and had undergone repairs and reconditioning, screening windows, installation of a "Navy-type" fence around the plant, etc. (Tr. 6, 191, 238.) The machinery and equipment in the plant were in good condition but required some checking, and the entire plant could have been put into operation in three weeks. (Tr. 8, 70, 72.)

Finding 3.

The plaintiff requests that the following addition be made to this finding:

During the year 1941, numerous inspections were made by Navy's representatives who informed plaintiff that they were satisfied with its plant and equipment. (Tr. 21, 181, 233, 235, 757.)

On August 2, 1941, plaintiff was informed by said Comdr. Uehlinger that he and his engineer would both approve plaintiff's proposal for the manufacture of gun mounts and that an award to that effect would be

made. (Tr. 23, 782.) As requested by the Gun Mount Section on August 23, 1941, plaintiff submitted additional information on September 9. (Tr. 23.) A conference was held on September 25, 1941, at the Navy Department, at which time plaintiff's representative was informed that the Navy was ready to place the order and the Navy submitted a written memorandum for additional information concerning its financial condition, proposed sub-contracts, machine tool study and proposed delivery schedule. (Tr. 24, 25, 767, 784—Plaintiff's Exh. 3.) The information requested by that memorandum was furnished by plaintiff on October 7, 1941, and included a copy of plaintiff's financial statement, machine tool study prepared by its chief engineer, list of all tools needed in the manufacturing of the gun mounts both "in the plant or immediately available", documentary evidence showing plaintiff's sources of supply of materials and commitments from the sub-contractors it proposed to utilize in performing a contract covering its proposal and a delivery schedule which provided for the first delivery to be made in February 1942. (Tr. 25, 201, 785—Plaintiff's Exh. 4.) Information as to sources of supply and sub-contractors were furnished to it by the Gun Mount Section. (Tr. 787-788.)

On November 28, 1941, BuOrd revised its plans and specifications for gun mounts upon which plaintiff's proposal (Plaintiff's Exh. 2) had been based, and requested plaintiff to revise its proposal accordingly. (Tr. 27, 202, 786, 787—Plaintiff's Exh. 16.) On December 13, 1941, plaintiff filed its amended proposal containing new prices as follows: (Tr. 27—Plaintiff's Exh. 5)

$12,600 for each complete unit on the basis of an award of 150 units, plus $550 per set of vessel spares
$ 5,500 per set of shore base spares
$ 1,650 per set of spares for tenders
$63,800 for tools, jugs, gauges and fixtures, and
$21,000 for patterns.

On December 18, 1941, an official negotiation conference was held at the Navy Department, attended by a number of representatives of both parties for the

purpose of final negotiation of the award. (Tr. 789-790.) At that meeting plaintiff's entire proposal (Plaintiff's Exh. 5) was reviewed by the Navy representatives and was accepted, and it was stated that it would not be necessary to issue a letter of intent because the contract would be issued promptly. (Tr. 29.) The proposal as accepted revealed that plaintiff was expected to sub-contract 45% of the work, although plaintiff intended doing all required machine shop work in its own plant. (Tr. 81, 94, 402—Defendant's Exh. 4.)

Everything was settled at that conference of December 18, except the matter of a bond. (Tr. 790-791.) At the end of that conference, and after Mr. Johnson and BuOrd's principal representative had left the meeting, an Ensign representing BuS and A asked Mr. Parse, plaintiff's Vice-President, whether "If the company were asked, would they be in a position to furnish a performance bond in an amount equal to 10% of the contract price?", and Mr. Parse answered in the affirmative. (Tr. 184, 185, 431.) The Navy representatives were surprised that plaintiff so readily agreed because it was thought plaintiff would request that the bond be waived. (Tr. 415.) The important thing to the Navy was not the bond itself but plaintiff's ability to get a bonding company to express a willingness to furnish a nominal bond, since such willingness would reflect whether plaintiff had financial ability. (Tr. 417, 418.) There was some mention that a bond signed by four individuals would also suffice. (Tr. 402, 434-435—Defendant's Exh. 4) but it was neither desired nor required that a bond or letter be furnished as a condition to the letter of intent or award issuing to the plaintiff on the terms negotiated. (Tr. 47, 297, 402, 431, 433.) Parse was also asked whether Navy financing would be requested and replied that the contract would be privately financed. (Tr. 184.)

On December 24, 1941, BuOrd notified the Naval Gun Factory that an award was being made to plaintiff for the manufacture of gun mounts and that certain technical plan data (Vandykes) should be furnished to the plaintiff to be used by it in the making of blue-

prints for its sub-contractors, etc. (Tr. 793, 795, 799—Plaintiff's Exh. 35.)

Finding 4

The plaintiff requests that the last three sentences of this Finding on page 32 be stricken, and that in lieu thereof the following addition be made:

On February 3, 1942, Mr. Johnson personally delivered to Comdr. Yoran a letter dated January 29, 1942, from the Maryland Casualty Co. addressed to the plaintiff, in which letter the bonding company stated it would furnish a $100,000 bond if the company changed its financial structure in either one of two alternative methods, and the second alternative provided that $200,000 of additional capital be invested in the company and that an item of $85,000 appearing on the balance sheet as an advance to stockholders be eliminated by the issuance of stock therefor to the creditor stockholders. (Tr. 35—Plaintiff's Exh. 7.) Upon delivery of the Maryland Casualty letter, Comdr. Yoran stated it was * acceptable and he immediately notified the award section that everything that had been asked for had been complied with and "told them to proceed with the award, and he sent me over to the award desk." (Tr. 36, 112, 470, 475, 477—Plaintiff's Exh. 32.) At no time was plaintiff requested either to furnish an actual bond or to recapitalize in accordance with the suggestion in the letter from Maryland Casualty Co. (Tr. 47-48, 297, 545, 546, 837-841—Plaintiff's Exh. 36) although plaintiff's officials were financially able and had expressed their willingness to comply with the aforesaid second alternative.

If a bond had been requested, the Navy form of bond would have been submitted to plaintiff as part of the printed form of contract, but no bond was ever requested. (Tr. 476-477, 488-489.) As of February 18, 1942, BuOrd had not been informed by BuSandA that plaintiff had submitted the surety's letter on February 3, 1942, and on February 18, 1942 BuOrd wrote an inter-office memorandum requesting BuSandA to no-

* Comdr. Yoran was not produced as a witness by defendant although it appeared he was still on duty in the Navy and stationed at the Charleston, S. C. Navy Yard.

tify plaintiff that the letter of intent would be cancelled unless a letter from surety was received by February 23, 1942. (Tr. 524—Plaintiff's Exh. 33.) BuSandA failed to give such notice to the plaintiff because the letter had in fact been filed with BuSandA on February 3, 1942. (Tr. 531.) At no time did BuSandA notify BuOrd that it had either received a letter from a surety company or that the letter was insufficient. (Tr. 528-529.) It was apparent that BuOrd did not know that the surety company's letter had been filed, and at that time either BuSandA had overlooked the fact that it had been filed; or, if it did not overlook its filing but considered it inadequate, it failed to give such notice to the plaintiff of any objection. (Tr. 544-546.)

Finding 5.

The plaintiff requests that there be stricken from this finding the last sentence on R. 32, and the remainder on R. 33, and in lieu thereof the following be added:

Plaintiff's facilities were adequate to perform the contract, but if any additional machinery was necessary, it could have been obtained by plaintiff, and financial arrangements had been made with the Federal Reserve Bank in Richmond if additional financing became necessary. (Tr. 221—Plaintiff's Exh. 19.) Plaintiff had prepared studies of machine tool operations and hours required, which were submitted to the Navy prior to the award. (Tr. 195-196—Plaintiff's Exh. 11.) Plaintiff had also furnished the Navy Department with copies of arrangements with sub-contractors relating to the work to be sublet after negotiations had been conducted with them. (Tr. 149, 187, 199—Plaintiff's Exh. 13.) As early as August 22, 1941, plaintiff had submitted a comprehensive plan for the production of gun mounts covering all phases of sub-contracting, machinery in the plant, engineering patterns, casting, assembly, etc., and those were considered by all to be adequate. (Tr. 174, 197, 138, 140—Plaintiff's Exh. 14.) Plaintiff had employed a very competent chief engineer, Mr. Kennedy, to handle the manufacture of gun mounts. (Tr. 129, 132.) He was

considered by Navy officials to be very able and "well qualified to perform the task". (Tr. 384, 385, 759-760, 780.) He prepared specifications based on the Navy's blueprints, tool and die design. (Tr. 136, 137.) There was an adequate labor supply of both skilled and unskilled labor immediately available in plaintiff's area and the contract to plaintiff was of general local interest. (Tr. 166, 172, 173, 177, 186, 241.) Plaintiff's facilities and the amount of sub-contracting (Tr. 141) plaintiff had arranged to use were such that the gun mounts called for by the cotnract could have been produced by plaintiff in accordance with plaintiff's proposal. (Tr. 155, 771.) See also facts set out in plaintiff's requested Finding No. 3 herein.

Finding 6.

The plaintiff requests that there be stricken from his finding on R. 33 the part as to the telegram of February 24, 1942, and that in lieu thereof the following be added:

> That official award was entitled "This is your official award of Navy contract Nos LL 96553", and stated that plaintiff's proposal theretofore submitted was accepted, that the contract price was $2,087,555 and instructed plaintiff to proceed with performance of the contract. (Tr. 41.)

Finding 7.

The plaintiff requests that the last two sentences be stricken from this Finding on R. 34, and in lieu thereof there be added the following:

> The evidence establishes that plaintiff could have successfully performed the contract and made a profit thereon as shown by plaintiff's request for a special finding under Number 5 above which is made a part hereof, and—
>
> Based upon costs and engineering manufacturing estimates computed from a study of machine tool operations and sub-contract prices, it appeared that if plaintiff had been permitted to perform the contract its profit would have amounted to 25% of the contract price of $2,087,000, or a gross profit of $500,000. (Tr.

146, 148, 149, 198. Plaintiff's Exh. 12) and this sum was subject to reduction by certain overhead expense items which would result in a net profit to the plaintiff of approximately 8% to 10% of the contract price, or a net profit between $167,000 and $208,000, for which plaintiff demands judgment. (Tr. 150-151.) * * *.

NAVY DEPARTMENT
BUREAU OF SUPPLIES AND ACCOUNTS
WASHINGTON, D. C.

22 June, 1949.

Honorable Robert L. Doughton
House of Representatives
Washington, D. C.

Dear Mr. Doughton:

Captain H. S. Covington, Navy Liaison Officer, has referred to me your letter dated June 10, 1949, pertaining to the request for information from Mr. R. H. McNeill, a Washington attorney. The latter appears to be concerned with the "fixed official practice of the Navy Department" during the spring of 1942, whereby a cancellation clause "may have been required to be inserted in some or all contracts entered into for war purposes."

In a letter from the Hon. James Forrestal, Acting Secretary of the Navy, October 10, 1943, Hearings before a Subcommittee on Contract Termination of the Senate Committee on Military Affairs on S. 1268, S. 1280 and S. J. Res. 80, 78th Congress, 1st Sess. 270-273 (1943) he said (p. 271):

> "The Navy Department commenced in the summer of 1941 the consideration of contract termination as it might affect procurement. At that time there were few actual terminations in contemplation. Contractors were, nevertheless, questioning the Government's right to terminate contracts and fair provisions permitting such termination without cause and defining the rights of the parties in such event were deemed necessary to facilitate the urgently needed procurement and to

minimize difficulties in the event of changing needs. A contract clause endeavoring to meet the procurement problem and safeguard the interests of both the Government and the contractors was then adopted and, except in respect of the ship construction contracts (a special problem), is in general form and substance in use in Navy contracts today."

In a memorandum submitted by Mr. Forrestal, dated January 11, 1944, it was stated that in the Navy,

> "Standard termination clauses for fixed price contracts were developed late in 1941, and in general form and substance have been inserted in most contracts entered into since that time except for ship-construction contracts, which constitute a separate problem. The Department has not undertaken to modify outstanding contracts by the insertiton of such clauses."

I do not believe that official Regulations, as such, were promulgated during the months of January, February and March, 1942, with reference to termination clauses, but I am of the opinion that this Department, along with the War Department, Maritime Commission, Treasury Department, and War Production Board, were at that time engaged in continuing study of the general subject, and that termination clauses were inserted in Navy contracts.

In accordance with your request, Mr. McNeill's letter dated June 9, 1949, is returned herewith.

Sincerely yours,

(sgd) C. W. Fox

E. D. FOSTER

Rear Admiral, SC, USN

Chief of Bureau

C. W. FOX

Rear Admiral, SC, US Navy

Deputy & Assistant Chief of Bureau